No. 155.

Brief of Wean & Prentice

Filed Oct. 11, 1897.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

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UNION MUTUAL LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

ELIZABETH KIRCHOFF.

IN ERROR TO THE SUPREME COURT OF ILLINOIS.

STATEMENT AND SUGGESTIONS ON BEHALF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS.

FRANK L. WEAN,
E. PARMALEE PRENTICE,
FOR PLAINTIFF IN ERROR.

The Goudy Wean Printing Company, 29 Madison St., Chicago.

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This case has been here before (160 U. S., 374), and in its main outline is one with which the members of the court are familiar.

The motion to dismiss the present writ of error on the ground that no Federal question is involved, comes to the second term after the allowance of the writ; after plaintiff in error has been to the expense of printing the full record, and on the eve, as it were, of argument, on the regular call of the docket.

The motion brings before the court every question in

the case, and for this reason it seems that if the motion be not denied, it should at least be reserved until the hearing of the case, that there may be opportunity for full presentation of these questions.

As it is impossible, under the rule, to argue the case fully at this time, it is our intention to do no more now than to show the existence of the questions which we desire, later to present to the court. In opposing the present motion, however, we are compelled to make a short statement of the principal points involved in the case.

STATEMENT.

Stated in the briefest possible form, the complainant's bill prays to redeem certain real estate in Chicago from a mortgage which had been foreclosed in the United States Court, sometime before the institution of the present suit, and this is the relief which the State courts have granted.

It is our contention that this proceeding in the State court constitutes, in effect, an attack upon the foreclosure decree of the United States Court, and if this contention be sustained, then, of course, a Federal question is involved in this case.

The ground upon which the complainant rests her right to the so called redemption, is a supposed verbal agreement, which complainant insists that the Insurance Company made with her in 1878, soon after its foreclosure bill had been filed in the United States Circuit Court for the Northern District of Illinois.

As stated in her bill, the supposed agreement was, in substance, that the Insurance Company would proceed with its foreclosure suit to completion, and take the title of all the mortgaged property, and would then, after its title had been perfected, convey a certain portion of the land to Mrs. Kirchoff, upon the consideration of the payment of $10,000 in installments of $1,000 a year.

The purpose of this agreement, as stated in complainant's bill, so far as it relates to the foreclosure suit, was to free the land from the lien of certain judgments against the Kirchoffs. (Pr. Rec., 24.)

It is alleged, in substance, that while the foreclosure

was to be effectual as against junior incumbrancers of the Kirchoffs, it was nevertheless to be wholly ineffectual, so far as it concerned the mortgagors or mortgagee; the decree of the United States Court being used as an instrument, not of foreclosure between the principal parties, but merely to relieve the property of the Kirchoffs from the burden of their debts.

The contention on the part of the defendant in error has been that, notwithstanding the foreclosure in the Federal court and the deeds issued to the Insurance Company thereunder, she was still entitled to a mortgagor's interest in the land, by reason of the alleged agreement, which interest, it is claimed, was not cut off by the foreclosure decree, although the agreement was claimed to have existed long before such decree was entered.

On the other hand, it has been insisted by the plaintiff in error, that the foreclosure proceedings were all they purported on their face to be, and that the decree in the Federal court cut off, not only all the rights and interests of junior incumbrancers, but also every interest of the defendants in that suit, and of all persons claiming through or under them, except, in so far as those rights were preserved by the statute providing for redemption.

It is not denied on the part of the Insurance Company, that there was some negotiation between its agents in Chicago and the Kirchoffs, looking toward a settlement of the foreclosure suit, and that in the course of these dealings, on or about the 11th of September, 1879, deeds were given to the agents of the Insurance Company in Chicago, by Mrs. Diversey, who owned part of the mortgaged property, and by the Kirchoffs.

The arrangements with Mrs. Diversey are matters into

which we need not go at this time. It is sufficient to say that the deed from Mrs. Diversey to the Insurance Company, was one which the agents of the company in Chicago had been authorized to accept. (Rec., 289, 149.) It was, therefore, immediately placed upon record. (Rec., 149.)

The deed from the Kirchoffs, which was delivered at the same time, was withheld from record (Rec., 149), for the reason that in the negotiation between the Kirchoffs and Kendall and Warfield, the agents of the Insurance Company, no terms of adjustment had been reached, sufficiently definite to submit to the company. (Rec., 149, 158.)

It was not until the 1st of November, 1879, that a definite proposition was made to the company's agents, and by them submitted by letter to the Insurance Company in Boston. (Rec., 130, 222, 176.) The answer to this letter was written on the 5th of November, 1879, and unequivocally declined the proposition. (Rec., 273; Exhibit 144.) This refusal was at once communicated to the Kirchoffs. (Rec., 152, 159.)

The proposition having been declined, Kendall either tendered back the quitclaim deed to Kirchoff, or gave him opportunity to withdraw it (Rec., 159), and in doing this he was only carrying out the original purpose in withholding the deed from record, until the home office had been heard from.

The Kirchoffs refused to receive the deed which was thus offered to them (Rec., 159), preferring to take their chances of enforcing the so-called agreement, notwithstanding its rejection by the home office.

After this Kendall went on with the foreclosure pro-

ceedings. Kirchoff took a lease from the receiver of the property which he and Mrs. Kirchoff then occupied.

Under the terms of the alleged agreement with the Insurance Company, any rent which might have been paid by Kirchoff during his occupany of this property would have been applied upon redemption money. In the lease as executed, no such provision in regard to rent was contained. (Rec., 97.)

In January, 1880, the Insurance Company amended its foreclosure bill by adding new parties defendant, and notice thereof was served on the Kirchoffs about the 17th of that month. (Rec., 193, 112.) In July, testimony was taken before the Master, and on the 30th of August, nearly a year after the rejection of the Kirchoffs' offer of settlement, a decree was entered, confirming the report of the Master and ordering a sale of the property. (Rec., 192, 193.)

The sale took place on the 20th of October, 1880, and the property was bought by the Insurance Company in parcels, for an aggregate amount of $92,000, being $1,000 less than the indebtedness. The two lots, of which a reconveyance at the aggregate price of $10,000 is sought in this suit, were bid in for the total sum of $17,000. (Rec., 193.)

In October 1881, the receiver filed a petition in the United States Court, showing that the Kirchoffs had refused to pay rent, and asking a writ of assistance to give him possession of the property. (Rec., 192.)

To this petition Mrs. Kirchoff, by her husband and agent, filed an answer, setting up the very agreement which is set up in the present suit; that the possession was asked in violation of the agreement, and stating

further that solicitors for the Kirchoffs have in preparation a bill in chancery setting up this agreement, and asking that complainant be required "to execute its under-"takings in the premises, or in default thereof, that the "decree herein be set aside and held for naught." (Rec., 24, 106, 107.)

Upon this question the decision of the United Circuit Court was against the Kirchoffs. The writ of assistance issued and the Kirchoffs were ejected. (Rec., 192.)

After this, the complainant took no further steps to assert her rights until the Master's deed had been delivered to the Insurance Company, and the proceeding in the United States Court was finally ended.

When the foreclosure was completed and after the Master's deeds for the mortgaged property had been delivered in accordance with the decree of the United States Court, the complainant filed her present bill in the Circuit Court of Cook County.

The Record.

The bill of complaint filed in the State court set out the foreclosure proceeding in the United States Court, and alleged that the Insurance Company, by virtue of this proceeding, claimed absolute title to the property in question: that in fact its title was not absolute, but was subject to an equitable interest in Mrs. Kirchoff, which interest was to be measured by the provisions of the agreement claimed. The prayer was, therefore, "that the complainant may be allowed to redeem said premises according to the terms of said agreement." (Rec., 25.)

To this bill the Insurance Company demurred, and the demurrer raised the question of the jurisdiction of a State

court to permit redemption from a mortgage which had already been foreclosed in a Federal court.

The demurrer was overruled, and the defendant thereupon answered, reserving a demurrer in its answer. The case was referred to a Master, and evidence was introduced at the hearing, of the whole foreclosure proceeding in the United States Circuit Court, and of the proceedings upon the Receiver's petition for a writ of assistance. (Rec., 191–193, 106.)

Upon pleadings and proofs the bill was dismissed for want of equity. (Rec., 30.)

This decree of dismissal was, however, reversed by the Appellate Court (33 Ill. App., 607; Rec., 317, 301), and this reversal was approved by the Supreme Court of Illinois. (133 Ill., 368; Rec., 305.)

It should be noticed, however, in view of the effort of counsel for defendant in error to treat the bill in this court as a bill for specific performance of a contract for conveyance of real estate, and not as a bill for redemption, that both the Appellate and Supreme Courts of Illinois expressly considered the bill as a bill for redemption, and not as a bill for specific performance. In the opinion of the Supreme Court, after discussing the evidence, and holding that the agreement claimed was one for redemption, the court said:

"We have said nothing in reference to the argument that this is a bill for specific performance, and hence falling within the Statute of Frauds, as we do not regard it as a bill of that character." (133 Ill., 368, 380; Rec., 311.)

In passing upon the question which the record presented as to the jurisdiction of the State court to review the decree of the Federal court, the Supreme Court of Illinois said:

"It is also claimed that complainant's failure to assert the alleged agreement in the foreclosure proceedings is a bar to its assertion here, and that the proceedings in the foreclosure are conclusive. We are unable to concur in this position. It was a part of the arrangement under which the complainant was to obtain the two lots in controversy that a decree of foreclosure should be entered and that the premises should be sold under such a decree. The decree was rendered and the sale made by consent for the purpose of clearing the different tracts of land mentioned in the quitclaim deed from certain incumbrances. The decree was not adverse to the interest of complainant, but in harmony with her interest; she is not attacking the decree, but claiming the enforcement of an agreement under which it was rendered, and in our judgment there is no ground for holding that the rights of complainant were cut off or in any manner impaired by the decree." (Rec., 311.)

In its opinion on the last appeal, the Supreme Court of Illinois held that "the merits of the case were settled adversely to the company" by its former opinion, to which reference has just been made, and so far as the Federal question is concerned the last opinion was merely an affirmance of the former. (Rec., 516.)

It therefore clearly appears:

First. That the bill in this case recited the foreclosure proceedings in the United States Court and alleged that defendant claimed to hold an absolute title to the lots in question, by virtue of these proceedings and of the Master's deeds obtained thereby. (A title claimed under an authority exercised under the United States.)

Second. That the defendant answered reserving the advantage of a demurrer, and admitting and averring the claim of absolute title under the Federal decree and deeds.

Third. That the defendant introduced in evidence the record and decree of the Federal court in support of the title thereby claimed.

Fourth. That a Federal question was thereby raised on the record in the State court by the pleadings and proof.

Fifth. That any decision of the case necessarily involved passing on this claim of title, and the decision of the question thus raised.

Sixth. That the opinion of the Supreme Court of Illinois shows that the question was actually passed upon by that court.

Seventh. That the necessary effect of the decree and judgment of the State court was against the right and title claimed by the defendant under Federal authority.

The present writ of error is thus brought, not only within the letter, but also within the spirit of section 709 of the Revised Statutes, as that section has been construed and applied in many cases by this court:

Dupasseur v. *Rochereau*, 21 Wall., 130.
Embry v. *Palmer*, 107 U. S., 3.
Factor's Ins. Co. v. *Murphy*, 111 U. S., 738.
Crescent Co. v. *Butchers' Union Co.*, 120 U. S., 141.
Crowell v. *Randall*, 10 Peters, 368.
Murray v. *Charleston*, 6 Otto, 432.
Murdock v. *City of Memphis*, 20 Wall., 590.
Roby v. *Colehour*, 146 U. S., 153.
Dowell v. *Applegate*, 152 U. S., 327.
Stanley v. *Schwalby*, 162 U. S., 255.

SUGGESTIONS.

I.

THIS IS A BILL TO REDEEM FROM A MORTGAGE WHICH HAD BEEN PREVIOUSLY FORECLOSED IN THE FEDERAL COURT. SUCH A BILL IS NECESSARILY A BILL TO REVIEW THE FORECLOSURE DECREE AND RAISES A FEDERAL QUESTION.

The present case is, we believe, controlled by the case of *Randall* v. *Howard*, 2 Black, 585. That was a bill filed in the Circuit Court of the United States for the District of Maryland, and sought relief from a foreclosure decree rendered by a court of that State. The ground for the relief asked was an alleged agreement, made before the decree in the State court, similar to the agreement, which is claimed in the case at bar, that the foreclosure should be proceeded with in pursuance of a "friendly arrangement," that the property should be bought by the complainant in the foreclosure suit and held by him, ostensibly for himself, but really as security for the indebtedness determined by the decree. The bill charged that having obtained an apparent title, the defendant fraudulently determined to act as if he was the real owner, and was claiming a right to sell, and that the defendant in futherance of his object, had by process, through the sheriff of the State court, dispossessed the complainant. The prayer of the bill was to restrain the defendant from disposing of the lands and for the sale of so much as might be necessary to pay off the defendant, according to the understanding prior to the sale, and that the residue of the lands be conveyed to the complainant.

It was claimed in that case as in the case at bar,

that the decree was entered by consent and in pursuance of a "friendly arrangement," or, as it has been stated in the case at bar, that "the decree was not adverse to the interest of the complainant, but in harmony with her interest; she was not attacking the decree, but claiming the enforcement of an agreement under which it was entered."

It was held by this court that the bill in that case was one of which the United States court had no jurisdiction. In passing upon this subject this court said:

"The bill in this case brings in review various matters passed on in the progress of a suit by the Cecil County Circuit Court, a court of general jurisdiction, having complete control of the parties and of the subject-matter of controversy.

It seeks to annul the sale of lands made by virtue of a decree of the Cecil County Court, sitting as a court of equity in a case pending between these same parties, to affect the distribution of the proceeds of the sale; to enjoin the defendant from making any disposition of the lands purchased by him; to disturb his possession; to invalidate his title, and to have the mortgaged property resold.

This is a direct and positive interference with the rightful authority of the State Court."

It seems there is no escape for defendant in error from the effect of this decision. The present case is "upon all fours" with the case to which reference is made. The decision was upon the very matter which is here presented, and supports the contention which the Insurance Company has made throughout this litigation. To the same effect, see, also, *Nougué* v. *Clapp*, 101 U. S., 551.

Aside from the authorities bearing upon the question, we believe that upon such facts as those involved in the present suit no other logical conclusion can be reached than that which was reached in the case of *Randall* v. *Howard*.

The only legal impediment in the way of redemption is the decree of foreclosure rendered in the United States Court, and the question presented by the present bill is, therefore, nothing else than the question, whether the mortgage upon the two lots now in controversy, was ever actually foreclosed. Did the Federal decree operate as a foreclosure of Mrs. Kirchoff's right of redemption?

What does a decree of foreclosure cut off if it does not cut off all preceding contracts with a mortgagor respecting the premises mortgaged? Can a mortgagor, summoned into court, hold back, even by mutual agreement, any of his claims on the premises involved? Can he carve out of the proceedings certain interests and contract rights, and allowing a decree to go against him in its widest scope, be sure that those rights will afterwards find specific enforcement?

What does a foreclosure suit determine if it does not determine all questions involved in a subsequent proceeding for a redemption from the same incumbrance?

"The right of redemption is barred by a valid foreclosure to which the party claiming the right was made a party. This proposition is elementary and is supported by all the authorities."

American and English Encyclopedia of Law, Vol. 20, page 626.

A foreclosure suit is a suit for an accounting between a mortgagor and mortgagee, in which a decree is sought which shall fix a limit to the mortgagor's right of redemption. These are the two salient features of a foreclosure suit: the accounting, and the limit which is placed by the decree upon the period of redemption. They exist in every suit for foreclosure of a mortgage.

A bill for redemption from a mortgage is a bill which

seeks precisely the same relief, except that it is filed by the mortgagor instead of the mortgagee. It seeks an accounting and it seeks to have a definite period fixed in which the mortgagor may redeem.

It will be seen, therefore, that the ground covered by the two suits is precisely identical. The subject-matter litigated in each case is the same. The decision of the court is upon the same rights. More than this, if the mortgagor who has brought a bill to redeem, fails to pay the amount due within the time ordered, and the mortgagee obtains judgment for costs, the mortgage is by that very fact foreclosed. The decree of dismissal with costs of a bill for redemption is itself equivalent to a decree of foreclosure, and has this effect, although it does not expressly declare it.

Stevens v. *Miner*, 110 Mass., 57.
Bolles v. *Duff*, 43 N. Y., 469.
Smith v. *Bailey*, 10 Vt., 163.
Shannon v. *Spears*, 2 A. K. Marsh (Ky.), 311.
Beach v. *Cook*, 28 N. Y., 508, 535.
Perrine v. *Bunn*, 4 Johns. Ch., 140.
Sherwood v. *Hooker*, 1 Barb. Ch., 650.
Adams v. *Cameron*, 40 Mich., 506.

Such a decree necessarily reviews a previous foreclosure decree. In the present case the decree of the State court reviews a previous Federal forclosure decree and this relief it was beyond the jurisdiction of the State court to grant.

II.

THE COMPLAINANT'S BILL ATTACKS THE FEDERAL DECREE OF FORECLOSURE ON GROUNDS WHICH, IF TRUE, WOULD AVOID THAT DECREE AS AGAINST ALL PARTIES.

The first and conspicuous feature of complainant's case, apparent upon the first reading of her bill, is the absolute illegality and immorality which permeates the alleged arrangement which complainant seeks to set up.

The agreement which she seeks to enforce was nothing less than that the Insurance Company should proceed with its foreclosure in the United States Court, for the benefit of the debtors, and hold the title, when acquired, in trust for them, to free the land from judgment liens of their creditors.

The relation of mortgagor and mortgagee which subsisted between the Insurance Company and the Kirchoffs, at the beginning of the forclosure suit, was to exist between them at its close, unaffected in any material particular. As between them, the controversy was to be apparent, not real. The whole proceedings were to be limited in their effect, so as to operate only against junior incumbrancers, and this limitation was to be imposed upon the Federal decree by an agreement, between the Kirchoffs and the Insurance Company, made, if made at all, more than a year before the decree was entered.

If we assume the truth of the statements contained in complainant's bill (Rec., 24), she has stated nothing more than that she was a party to a conspiracy, the purpose of which was to impose upon the United States Circuit Court and use its decree merely as a means of perpetrating a fraud.

This phase of the case received considerable attention in the case of *Randall* v. *Howard*, to which reference has been made. In passing upon the character of such an agreement, this court, speaking by Mr. Justice DAVIS, and after quoting the allegations of complainant's bill, which in that case were substantially the same as those at bar, said:

"These allegations, stripped of their indefiniteness and vagueness, mean simply this: That the parties to this bill, in order to counteract a claim set up by other parties for a portion of the mortgaged lands, combined together, through the aid of the court, to shorten the time of sale, and to cover up the real ownership of the property.

"A fraudulent agreement was entered into, to defeat, as is charged, 'a fraud attempted against the complainants.' If the claim set up was a fraud on the rights of the complainants, does that consideration change the character of the agreement which was made to defeat that fraud? Manifestly not. The whole complaint of the bill is that the defendant will not execute the agreement thus fraudulently made, and the object of the bill is to compel him to do it.

"A court of equity will not intervene to give relief to either party from the consequences of such an agreement. The maxim '*in pari delicto delicto potior est conditio defendentis*' must prevail.

"It is against the policy of the law to enable either party in controversies between themselves, to enforce an agreement in fraud of the law, or which was made to injure another. Story's Equity, Vol. 1, Sec. 298; *Balt* v. *Rogers* (2 Paige, 156); *Wilson* v. *Watts* (9 Gill, 356)."

See, also,

Connelly v. *Cunningham*, 5 Pacific Reporter, 473.

Frisby v. *Withers*, 61 Texas, 134.

The decree of the State courts in the present case would, therefore, if sustained, have the effect of annulling

the Federal foreclosure decree as against all parties to that suit. The agreement stated in complainant's bill, that the foreclosure should be complete so as to cut off the rights of her judgment creditors, but not so as to affect her rights, would be a fraud upon creditors, and cannot be enforced. The decree must stand as a whole, or fall as a whole.

The action of the State courts in setting it aside, as to Mrs. Kirchoff, amounts, therefore, to nothing less than setting it aside as to all parties and leaving all matters heretofore established by Federal decree open for future adjustment, save as they have been settled by the decree of the State courts in the present suit.

III.

THERE IS NO FINDING OF FACT MADE BY THE STATE COURT IN THIS CASE, WHICH WOULD ENABLE THAT COURT TO DECIDE THE CASE, WITHOUT PASSING UPON THE FEDERAL QUESTION.

We have already shown that it was the intention of the Kirchoffs' solicitors, in drafting the present bill, to make a direct attack upon the Federal decree. The answer filed to the receiver's petition for a writ of assistance, by Mrs. Kirchoff, through her husband, Julius Kirchoff, in the United States Court, asked that that court should take no action in the premises, and as one of the reasons for delay, stated that Mrs. Kirchoff's solicitors "have in course of preparation a bill in chancery setting up" the facts stated in the present bill, "and asking that complainant be required to execute its undertakings in the premises, *or in default thereof that the decree herein be set aside and held for naught.*" (Rec., 106.)

The intention of the solicitors for defendant in error was therefore, confessedly, to make an attack upon the Federal decree.

It is their present contention, however, that their bill does not disturb the foreclosure proceedings in the Federal Court, but merely prays for a conveyance by the Insurance Company, pursuant to the agreement.

It is said by counsel for defendant in error that "the questions at issue in the State court were purely and simply, whether or not, *as a matter of fact*, such an agreement as was alleged in the bill was made, and if so, whether or not, *as a matter of law*, the defendant in error was entitled to a conveyance from the plaintiff in error." (Brief, p. 17.)

It is argued that the State courts of Illinois have found, as a matter of fact, that the agreement alleged in the bill was made. This finding, counsel say, the Supreme Court of the United States has no power to review, and if it be accepted, it is insisted must be conclusive of the case.

Of course, the Insurance Company denies the contract, and it is believed that the evidence shows that the judgment of the Circuit Court of the United States upon the receiver's petition was correct, and that the findings of the State courts are not supported by the evidence.

Without stopping, however, to discuss this question, we admit that this court has often held, at least in actions at law, that it has no jurisdiction "to review the decision of the highest court of a state upon a *pure* question of fact."

Israel v. *Arthur*, 152 U. S., 355.

The findings of the State courts, however, upon questions of law, are not conclusive upon this court, and it

makes no difference whether the question of law arises upon the evidence or not.

Thus, in *Dushane* v. *Beall*, 161 U. S., 513, the court held that "*If all the facts stated in the record before us do not, as a matter of law*, warrant the conclusion at which the highest court of the State arrived upon the question, it is the duty of this court so to declare, and to render judgment accordingly." To the same effect was the case of *Stanley* v. *Schwalby*, 162 U. S., 255, where the court, in considering whether the purchaser of a title took it with notice of an existing defect, said:

"*The evidence* appears to us *wholly insufficient, in fact* and in law, to support the conclusion that the attorney had any notice of the previous deed to McMillan, or any knowledge of the circumstances tending to prove the existence of such a deed, that he should have considered and treated them as of any weight, or have reported them to the authorities at Washington. The inevitable conclusion, *as matter of law*, is that the United States acquired a good and valid title, as innocent purchasers, for a valuable consideration, and without notice of a previous conveyance to McMillan."

In the decisions of the State courts in the present case, no findings of fact were made in the decrees which have been entered, but upon turning to the opinions which have been rendered in the case, to ascertain what the conclusions of the court were, we find that the courts have decided that the Insurance Company, in 1878, entered into the contract claimed in the bill.

Union Mutual Life Insurance Co. v. *Kirchoff*, 133 Ill., 368; Rec., 305.

There are involved in this finding, some questions of law which will not be discussed here. For our present purpose, it will be sufficient to call attention to the un-

disputed fact, that the Insurance Company absolutely and unequivocally repudiated this contract in 1879, and notified the Kirchoffs that it recognized no such agreement. (Rec., 273, 159, 152.) The proposition having been declined, Kendall either tendered back to Kirchoff the quitclaim deed, or gave him an opportunity to withdraw it. (Rec., 159.) Kirchoff, however, refused to accept the deed. (Rec., 159.)

After this the Insurance Company went on with the foreclosure proceedings. In January, 1880, the bill was amended by adding new parties defendant, of which the Kirchoffs had notice. (Rec., 159.) In July testimony was taken before the Master, and on the 30th of August, ten months after the Insurance Company had notified Kirchoff that it denied the existence of the so-called agreement, the foreclosure decree was entered, confirming the report of the Master, and ordering sale of the premises. The sale took place on the 20th of October, 1880, and the property was bought in parcels by the Insurance Company; the two lots which it is sought to "redeem" in the present case for the sum of $10,000, being purchased by the Insurance Company for $17,000.

We cannot enphasize too strongly the fact that even accepting the finding of the State courts, that the Insurance Company in 1878, made the contract claimed, it is nevertheless true,

a. That the Insurance Company repudiated the agreement on the 5th of November, 1879, and immediately notified Kirchoff that it would go no further with it; and

b. The State courts have made no reference to the fact, nor any findings upon this subject.

The question of law that is presented is, therefore, this;

What effect is to be given to the action of the Insurance Company in repudiating this contract and giving the Kirchoffs' notice of its refusal to be bound by it?

The State courts have, it is true, found that the Federal foreclosure decree "was rendered and the sale made by consent for the purpose of clearing the different tracts of land, mentioned in the quitclaim deed, from certain incumbrances. (*Insurance Company* v. *Kirchoff*, 133 Ill., 368, 380; Rec., 311.) The question whether consent was ever given may be a question of fact, but the question as to the right of the Insurance Company to withdraw that consent, and as to the effect of its action when it did withdraw its consent, taken in connection with the foreclosure proceedings, are questions of law, and these are among the questions upon which we desire to be heard in this case.

It is quite clear that in course of foreclosure in the United States court a dispute arose between the Insurance Company and the Kirchoffs as to whether any adjustment of the matters at issue between them had been made; the Kirchoffs on the one hand claiming the existence of a contract, and the Insurance Company, on the other hand, denying that any contract had been made, and refusing to perform obligations which it insisted it had not assumed.

Under these circumstances there must have been some course open to the Insurance Company by which this dispute could be adjudicated. The matters in dispute were the very matters involved in the Federal foreclosure suit, and concerned the title which was to be derived through foreclosure sale, the terms upon which the redemption was to be allowed and the parties against whom the decree was to operate. The Insurance Company claimed

the right to have the property sold at foreclosure sale, free from any interest of the Kirchoffs, and it claimed the right to limit redemption by the mortgagors to the statutory period.

The Kirchoffs knew that the Insurance Company denied the existence of any agreement between them, but for nearly a year they lay by and asserted no claim under this so-called agreement, while the Insurance Company prosecuted its hostile foreclosure.

The Kirchoffs knew that if the contract was a lawful contract for legitimate purposes such as a court could approve, it could have been embodied in the foreclosure decree. The very act of applying for and procuring the entry of a decree, inconsistent with the agreement, was an adverse, hostile act, and was the fitting termination of a year of hostile foreclosure proceedings.

It is the argument of counsel for defendant in error that "the perfecting title by the foreclosure proceedings was part of the agreement," (Brief, p. 11) and it is argued that the agreement claimed would not have operated as a defense to the entry of a foreclosure decree, for the reason that the agreement contemplated the entry of such a decree.

A sufficient answer to this is, that the agreement did not contemplate the entry of such a decree as was actually entered. The agreement would not have been a defense in the foreclosure proceeding, in the sense that it would have prevented *any* decree of foreclosure from being entered, but if the agreement was a lawful one, it would have been a defense against the entry of any decree which would give to the Insurance Company rights, which were inconsistent with its rights under the agreement.

Of course, assuming that the agreement was actually made, it is very easy to see why it could not have been brought forward to the court or embodied in the decree. The benefit which Mrs. Kirchoff expected to derive from the foreclosure, as disclosed by the bill, was, that she would get her property out of the way of her creditors without injury to herself.

If, therefore, she could have found any court sufficiently complaisant to lend its records to such a purpose, its compliance would have been ineffectual, for a statement in the decree of an interest remaining in Mrs. Kirchoff would have exposed this interest to the rights of her creditors and have defeated the very purpose sought.

We have touched upon this subject elsewhere. The fact to be noted here is that the Kirchoffs did keep silence about their supposed agreement for at least a year. They let a decree go against them which was inconsistent with the rights which they are now claiming; they waited until the period of redemption allowed by the decree had expired, and until the deed had been delivered to the Insurance Company, and then they set up in another forum the claims that they could have presented, but did not present, to the United States Court

There can be no doubt that a decree of a court of competent jurisdiction is binding upon all parties to the proceeding in which it was entered, as to all matters actually determined, and as to all other matters which might have been raised and determined in the case.

A person having a good defense is not permitted when sued, to keep silence, let a judgment go against him, and then raise his defense in some other proceeding or in some other forum.

It follows, therefore, that as soon as the Insurance Company repudiated Kirchoff's claim on the 5th of November, 1879, it was then complainant's duty to at once set up her rights in the foreclosure proceedings, if she had any, and failing to do so, she is estopped by the Federal decree from now setting up in the State courts, claims which existed before the entry of that decree.

That the Federal decree is, under such circumstances, conclusive and binding, is, we believe, established by the following cases:

Dowell v. *Applegate*, 152 U. S., 327.
Nogué v. *Clapp*, 101 U. S., 551.
Jones v. *Vert*, 121 Ind., 140.
May v. *Coleman*, 81 Ala., 325.
Speck v. *Pullman Co.*, 121 Ill., 33.

In *Mally* v. *Mally*, 52 Ia., 654, we find a case very similar to the one at bar.

In that case the plaintiffs brought an action for the possession of certain real estate, title to which they had obtained under the foreclosure of a mortgage. In defense of the proceeding the defendants, who had been the mortgagors, set up a written contract which they alleged had been made with the mortgagee prior to the foreclosure. This contract provided for a life lease on a portion of the land in question, to Christine Mally, one of the defendants and the wife of the other defendant, and in it other concessions appeared to have been made by the mortgagee for the benefit of the mortgagors. It apppeared that these claims were not set up in the original foreclosure proceedings until after the judgment of the court was announced. Judgment of foreclosure was entered against the defendants, the property was bid in by the

mortgagee and deeds regularly issued as in the case at bar. The action above referred to was then brought, by the parties holding sheriff's deeds, for possession. Judgment was rendered for the plaintiffs and the defendants appealed. The Supreme Court of Iowa in its opinion in this case says:

"The defendant insists that the plaintiffs are not entitled to the immediate possession of the property because of the provisions of the written contracts set out in the answer and the amendment thereto. The plaintiffs in the foreclosure suit prayed for an unconditional foreclosure of the mortgage. *The decree rendered is an absolute one*, accompanied with the usual incidents, and to be followed by the usual consequences of an absolute foreclosure. It authorized a sale, to be followed, in the absence of redemption, by sheriff's deed, entitling the purchaser to immediate possession. Such a sale has been made, and such a deed has been executed. *If any facts existed at the time of the foreclosure, under which the plaintiffs would not have been entitled to an absolute decree of foreclosure, these facts constituted pro tanto a defense to the plaintiff's action*, and should have been pleaded as such in the foreclosure proceeding. These written contracts constituted such partial defense, or they did not. If they constituted such partial defense, they should have been set up and relied upon in the foreclosure proceeding, and cannot be made available now. *Hackworth* v. *Zollers*, 30 Iowa, 433; *Dewey* v. *Peck*, 33 Iowa, 242; *Lawrence Savings Bank* v. *Stevens*, 46 Iowa. 429; *Collins* v. *Chantland*, 48 Iowa, 242.

If these contracts did not then evidence a condition of things which would have prevented an absolute foreclosure, they cannot now be set up to deprive the plaintiffs of the benefits of the absolute foreclosure which they have obtained.

The defendants did offer to set up the contract set out in the original petition as a defense in the foreclosure proceedings, but not until after the court had announced its judgment in the case. The court refused to allow the amendment as coming too late. It was clearly within the judicial discretion of the court to refuse to allow the

amendment under the circumstances disclosed; *and if it were not, the decision of the court, not having been appealed from, is conclusive upon the defendants.* In any view of the case the written agreements do not now constitute a defense to the plaintiffs' action."

IV.

THE DECISION OF THE UNITED STATES COURT UPON THE APPLICATION FOR A WRIT OF ASSISTANCE IS CONCLUSIVE OF THE PRESENT CASE.

The matter presented to the Federal court upon the hearing of the receiver's petition was precisely the question which was litigated in the State courts of Illinois—as to whether the Insurance Company had made the agreement claimed, and what effect, if any, should be given to that agreement. In Kirchoff's answer to the receiver's petition, which the present bill alleges to have been Mrs. Kirchoff's answer, he set up every claim made in the present suit. It is true that all the receiver asked for, was that possession of the property be delivered to him, but the question of possession involved the question as to the existence of the agreement under which the Kirchoff's claimed. That question of fact was therefore presented to the court, and was necessarily passed upon by the court.

It is argued by counsel (Brief, p. 12) that at this time the United States Court had lost all jurisdiction of the case, but under the decisions of this court such an objection can have no foundation, for the property was still in the hands of the receiver of the United States Circuit Court, and "nothing can be plainer than that any litiga-

tion for its possession must take place in that court without regard to the citizenship of the parties."

Minn. Co. v. *St. Paul Co.*, 11 Wallace, 632.

Freeman v. *Howe*, 24 Howard, 450.

Randall v. *Howard*, 2 Black, 585.

The argument that this judgment was not conclusive in the present proceeding because, as counsel for defendant in error say, "Neither of the parties to this case was a party to that proceeding" (Brief, 12), is equally without foundation. It is true that the answer to the receiver's petition was signed by Julius Kirchoff, but it is also true that the bill of complaint in the present case alleges in terms:

"That thereupon *your oratrix*, through her said husband, resisted said application for said writ of assistance, and set up as defense to the application of said receiver, an answer setting forth in substance the aforesaid agreement between *said Company* and your oratrix, but *said Company*, through its solicitors employed in said suit, supported the application of said receiver, and wholly disregarded its agreement with your oratrix, and procured the order of said court for the assistance of said writ, whereby your oratrix and her husband were compelled to vacate their homestead."

V.

THE FEDERAL QUESTION IS CONTROLLING.

It follows from what has been said, that the ground covered in the present case was completely covered by the previous decrees of the Federal court. Every claim presented to the State court in this suit had already been

before the Federal court in the foreclosure suit. The larger issue of whether the Insurance Company in that suit had the right to the foreclosure of its mortgage as against all the rights of all the defendants to the suit, in that property, included every issue that could be made in the present case, and when the State court undertook to grant relief to the complainant in this suit, it failed to give the Federal decree the effect to which it is entitled, and we submit that this is the controlling question in the present case.

FRANK L. WEAN,
E. PARMALEE PRENTICE,
For Plaintiff in Error.

No. 1285

Brief of Union Mutual Life Ins. Co.

Filed April 24, 1897.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

No. 1285.

UNION MUTUAL LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,
vs.
ELIZABETH KIRCHOFF.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

FRANK L. WEAN,
E. PARMALEE PRENTICE,

JOSIAH B. DRUMMOND,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

No. 155.

UNION MUTUAL LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

ELIZABETH KIRCHOFF.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

FRANK L. WEAN,
E. PARMALEE PRENTICE,

JOSIAH H. DRUMMOND,
Of Counsel.

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UNION MUTUAL LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

ELIZABETH KIRCHOFF.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

The litigation in this case began with a bill in chancery filed by Elizabeth Kirchoff in the Circuit Court of Cook County, at Chicago, in which complainant (defendant in error here) sought a decree for the redemption of two tracts of land from a trust deed which she had given to the Union Mutual Life Insurance Company in 1871; the bill expressly showing on its face, that the trust deed had been foreclosed and that the interest of the Insurance Company had, some time previously, been converted from that of a mortgagee, into that of an absolute owner, through judicial proceedings in the United States Circuit Court for the Northern district of Illinois.

The ground upon which defendant in error rests her claim of right to this redemption is a supposed verbal agreement which she insists the Insurance Company made with her in 1878, soon after its foreclosure bill had been filed in the United States Circuit Court.

As stated in her bill, the agreement was in substance that the Insurance Company would proceed with its foreclosure suit to completion and take the title to all the mortgaged property; that after its title had been perfected, it "would allow your oratrix *to redeem from said trust deed* the said two lots of land, hereinbefore specifically described" (Rec., 23), upon the consideration of the payment of $10,000 in installments of $1,000 a year, and to effect this result, would convey its absolute title, derived through such foreclosure, by deed to Mrs. Kirchoff, the purpose of this agreement, as stated in her bill, so far as it related to the foreclosure suit, being to free the land from certain judgments against the Kirchoffs. (Rec., 24.)

As originally framed in June, 1882, the bill avoided a prayer for redemption in express terms, but having set out an agreement for redemption, the bill prayed that the defendant "may be compelled by the decree of this court specifically to perform the said agreement with your oratrix and convey to her the said two lots of land hereinabove specifically described." (Rec., 15.)

To this bill, regarded solely as a bill for the specific performance of a verbal contract for the sale of land, the Statute of Frauds would have been a complete defense, and to avoid this difficulty the bill was amended in 1887, so that it asked "that your oratrix be allowed to redeem said premises according to the terms of said agreement." (Rec., 25.) It is this prayer which the State Courts have

granted, as appears from the statement of the Supreme Court of Illinois, that

"We have said nothing in reference to the argument that this is a bill for specific performance, and hence falling within the Statute of Frauds, as we do not regard it as a bill of that character." (Rec., 311; 133 Ill., 368, 380.)

On the part of the Insurance Company, it is contended that the foreclosure proceedings in the United States Circuit Court are all they purport on their face to be; that the foreclosure decree cut off not only all the rights and interests of junior incumbrancers, but all the rights of all the defendants to the suit in the mortgaged property, and of all persons claiming through or under them, except in so far as those rights were preserved by the statute providing for redemption, and that the State Court had no jurisdiction to review that decree, or to permit redemption from a mortgage which had been foreclosed thereby.

On the part of the defendant in error, it is claimed that notwithstanding the foreclosure in the Federal Court, and the deeds issued to the Insurance Company thereunder, she is still entitled to a mortgagor's interest in the land, by virtue of the alleged agreement, which, it is said, was not cut off by the foreclosure decree, although it was made, if made at all, before the decree was entered, and relates to the subject-matter passed upon by the decree.

It is our purpose in presenting the case to this Court to argue only the questions of law which are involved. These questions arise partly upon the face of the pleadings, the decree and the opinions of the State Courts, and partly upon the evidence in the record. It will be necessary, therefore, to look into the evidence and record, sufficiently, to show what questions of law are presented to this Court for review.

STATEMENT OF FACTS.

On the 8th day of May, 1871, the defendant in error and her husband, being the owners of certain lots in Chicago, and Mrs. Kirchoff's mother, Angela Diversey, the owner of certain other lots in Chicago, and a farm in Cook County, joined in a note to the Insurance Company (plaintiff in error) for $60,000, secured by trust deed upon nearly all the property belonging to them. This note matured in three years and bore interest at the rate of eight per cent.

The husband of defendant in error, for whose benefit the loan was negotiated, was not prosperous in business and failed to pay either the interest or principal coming due. He soon went into bankruptcy (Rec., 125), and, in 1876, the note, with accrued interest, amounted to upwards of $75,000, while the real estate securing it, stricken by the panic of 1873, was worth less than that amount. (Rec., 134.)

About this time Mrs. Diversey awakened to the danger of her situation upon Kirchoff's indebtedness. Having gotten herself into difficulties through the importunities of one son-in-law, she seems to have sought a way of getting out through the advice of another. (Rec., 124.) In July or August, 1877, some kind of a proposition was made to extend the whole loan for ten years, reducing the interest from eight to five per cent.—five per cent. of the principal to be paid with each semi-annual payment of interest. (Rec., 264.) These negotiations, however, failed, chiefly through the advice of Mr. Weckler, Mrs. Diversey's other son-in-law, against her making herself

liable a second time for Kirchoff. (Rec., 124.) About this time a judgment was entered up by the Insurance Company against Mrs. Diversey for $75,696.89 upon the note executed collaterally with the trust deed. (Rec., 124.)

No further steps of any definite character were taken by either of the parties to the mortgage until the 11th of July, 1878, at which time the Insurance Company filed its bill in the United States Court to foreclose its mortgage. (Rec., 191.) The bill, in addition, sought to correct a misdescription of property, named in the mortgage, belonging to Mrs. Diversey. The defendant in error and her husband were defaulted on the 11th of November, but Mrs. Diversey, on the 20th of the same month, filed an answer, denying the right of the Insurance Company to correct the misdescription, and averring that the notes and mortgage were procured from her by misrepresentation. (Rec., 191.) From this date the relations of the parties seem to have remain unchanged until about the 9th of June, 1879. In the mean time, however, the Insurance Company was urging its attorney, Kendall, to use vigorous measures to push the case to a speedy termination. (Rec., 271, Ex. 137.)

There was during this interval more or less negotiation between Warfield and Kendall, the agent and attorney of the Insurance Company, and Mrs. Diversey and the Kirchoffs, respecting an adjustment of the loan. All the parties had discovered, by the last appraisement made, that the value of the property had sunk considerably below the amount of the loan. (Rec., 217.) Under such circumstances both Mrs. Diversey and the Kirchoffs were naturally desirous of making an arrangement by which they should all be released from an impending deficiency de-

cree. Mrs. Diversey desired, of course, to save as much of her property as possible; and, therefore, probably as a make-weight in the negotiations, resisted the effort to correct the misdescription in the trust deed. The Kirchoffs, equally anxious to be released from a deficiency decree, were willing to repurchase the farm and the two lots, upon one of which their homestead stood, at a valuation of $25,000, to be evidenced by long paper, bearing interest at four per cent. (Rec., 126; Letter, November 25, 1878.) But neither this nor any other proposition of the Kirchoffs could be finally acted upon by the Insurance Company, until a settlement with Mrs. Diversey should first be agreed upon; otherwise, as Kendall wrote to the home office on the 1st of January, 1879, "it might prejudice our claim against Mrs. Diversey." (Rec., 127, 216, Ex. 29.)

On March 21, 1879, Kendall wrote the company as follows:

"Mrs. Diversey will agree to settlement on basis proposed sometime ago to the company by me and assented to by letter of vice president, viz.: Let her keep forty acres of her farm and execute quitclaim of the rest; *Kirchoff and wife to quitclaim all their property covered by our mortgage.* The old trust deed on the Diversey farm prior to ours to be released, etc., and everything made tight and safe." (Rec., 289.)

Finally, about the 9th of June, 1879, an agreement was reached by which the Insurance Company was to release to Mrs. Diversey its claim upon forty acres of land belonging to her, and she was to execute to it a warranty deed for the remainder of the premises. (Rec., 129.)

At the same time, a quitclaim deed, including all of the property belonging to Mrs. Kirchoff and her husband was prepared by them. None of these deeds were de-

livered, however, until the 11th of September, when Kendall, acting for the Insurance Company, received from Mrs. Diversey her deed and delivered to her the release deed of the company. About the same time he received from Mrs. Kirchoff and her husband the quit-claim deed of all the property belonging to them, and included in the mortgage. The deed from Mrs. Diversey was immediately placed on record. (Rec., 129, 130, 149.) But the deed from the Kirchoffs was withheld from record by Kendall. (Rec. 132, 149, 158.)

The defendant in error insists that during the preceding negotiations, it was agreed, in consideration of her quit-claim deed, that the Insurance Company would re-convey to her the two lots now in question; one of which was then occupied by her as her homestead, and the other cornering upon it, but facing the other way; that the price at which the re-conveyance should be made was their valuation at a previous appraisement by James H. Rees, namely, $7,500 and $2,500, respectively; and that Mrs. Kirchoff was to execute in payment therefor, her notes for $10,000, extending over a period of ten years, bearing interest at six per cent. and secured by mortgage upon the two lots.

"That thereafter, upon examination of the title to said lots, it appeared that there were certain intervening liens and incumbrances upon the same, created after the execution of said trust deed and prior to the agreement hereinbefore set forth for such redemption by your oratrix, * * * and it was thereupon agreed by and between the said company and your oratrix, that the agreement for said redemption should not be further performed, until the title had been perfected in said company by said foreclosure proceedings, but the further execution thereof should be held in abeyance until after such foreclosure proceedings should be completed and *the title to said lots*

become perfected in said company, discharged of such incumbrances, etc., and in the meantime that your oratrix should interpose no defense to such foreclosure proceedings." (Complainant's Bill, Rec., 24.)

Upon the strength of this alleged agreement the defendant in error insists upon her so-called right of *redemption* in accordance with its terms.

The Insurance Company, on the contrary, having at all times insisted that no such agreement was ever concluded, has also argued that the State Courts are bound by the decree of the Federal Court and have no jurisdiction to review it.

It will not be disputed that propositions similar to the so-called agreement were spoken of and discussed between Warfield and Kendall and the Kirchoffs, or that assurances were given by the former, of the probable willingness of the Insurance Company to sell the lots on the terms named. But the record indisputably shows that, when the Insurance Company was advised of the proposition by Mr. Kendall, it was instantly and unequivocally declined, and this action of the Insurance Company communicated to Mrs. Kirchoff, in time to prevent any injury to her from the quitclaim deed. After having been thus fully advised, she chose to deliver her deed, and, in that manner, get the benefit of the release from her indebtedness, *taking her chances of being able to make the rejected negotiations hold as an agreement.*

As stated above, Kendall caused the Diversey deed to be recorded the next day after its delivery and on the 22d of October following, sent it to the company. (Rec., 221.) The Kirchoff deed, however, was withheld from the records. Its execution was reported to the company, but no mention of any accompanying arrangement whereby the

homestead lots, or either of them, was to be reconveyed to the defendant in error, was communicated or proposed to the company until the first of November following. (Rec., 130, 176.) Warfield and Kendall both knew that they had no authority in the premises, except to communicate propositions to the company. (Rec., 73, 74, 91, 92, 98, 120, 121, 175, 287, 288.) It is more than probable that this delay upon the part of the attorney and agent in Chicago was due to the fact that the exact terms of Kirchoff's proposition had not yet been definitely arranged. Warfield remembers such a misunderstanding. (Rec., 98.) Kendall recalls that "Kirchoff had always objected to paying cash down, but wanted to pay at the end of six months." (Rec., 150.) "I told him that I would submit that proposition to the company, but that I had no idea they would accept it, because they never did—always required a payment down." (Rec., 150, 151.)

Finally, about the 1st of November, 1879, without coming to any conclusion, either on the terms of payment or the price, Kirchoff consenting, however, that the proposition should cover one lot only, a deed covering the homestead lot was drafted, and the proposition *for the first time* communicated to the company. (Rec., 158, 176, 222.) While no direct explanation of this delay in submitting the proposition, is given, Mr. Kendall explains why the Kirchoff deed was withheld from record, and shows, too, that it was understood all around, that no reconveyance could be definitely agreed upon until a proposition therefor was submitted to and approved by the home office of the Insurance Company. His testimony on this subject may be found upon pages 149 and 150 of the printed record, and is substantially as follows:

"When I received the deeds from Mrs. Kirchoff and Mrs. Diversey, I recorded the Diversey deed but held the Kirchoff deed in my office until I should hear from the company in regard to the conveyance to be made to Kirchoff; the Kirchoff deed having been made, as he explained to me, with the understanding on his part that he was to have a deed from the company of his homestead and the adjoining lot on Pine street, I did not feel like receiving it unconditionally. I told Kirchoff that while I had no doubt that the company would make a deed to him of the lot or lots on the terms proposed, I did not wish to do anything final in the matter without first having the formal authorization on the part of the company. * * * *The Diversey deed was placed on record, because that matter I considered as settled, and that I had the proper authority in writing from the company, to warrant my closing the settlement.*" (Rec., 149, 150.)

Also:

"I think I stated the matter somewhat in this way to Kirchoff at the time: That I would take his deed, would write to the company in regard to the conveyance back to him; in the meantime would not put his deed on record, nor take any advantage of him, intending to keep the matter open, so far as I can recollect now, until he had definitely settled the terms of his contract with the company, if he had any." (Rec., 158, 159.)

Kirchoff nowhere denies what Kendall here testifies to. Nothing further was done in Chicago, until the answer of the Insurance Company to this letter of November 1st had been received. That answer was written on the 5th of November, 1879 (Rec., 273, Ex. 144), and unequivocally declined the proposition submitted, or *any* proposition to sell to *Mr.* Kirchoff. It offered, at any time within the next thirty days, to sell the lot to Mrs. Kirchoff for $8,400, instead of $7,000; one-fourth in cash, and the balance in twenty equal semi-annual installments.

Kirchoff and Kendall knew about when to expect an answer to this letter. It is not improbable that when the answer came, Kirchoff was there, and was told its contents. This is the suggestion from Kendall's testimony (Rec., 152, 159), and Kirchoff, while not expressly admitting this in terms, substantially admits the facts. (Rec., 41.) In any event the contents of the answer were promptly communicated to Kirchoff and, the proposition having been declined, Kendall either tendered back the quitclaim deed to Kirchoff, or gave him opportunity to withdraw it. (Rec., 159.) In this he was only carrying out his original purpose in withholding the deed from the record until the home office had been heard from. The evidence on this subject will be set out fully hereafter. See *post*, pp. 63, 64, 65.

But Kirchoff did not wish to withdraw the deed, and thus lose the benefit of its operation as a satisfaction of the indebtedness. Neither did he wish to accept the company's counter-proposition, for that involved, not simply a slightly increased price, but also, what was much more to him, the payment in cash of one-fourth of the purchase money. He therefore concluded to deliver the deed at any rate, and to rely upon what he called his contract, or his previous understanding with Warfield and Kendall, as being sufficiently binding to secure him a reconveyance, notwithstanding its rejection by the company. (Rec., 153, 41, 247.) After this Kendall went on with the foreclosure proceedings. Kirchoff took a lease from the Receiver for the homestead property which he and Mrs. Kirchoff then occupied. In January, 1880, the bill was amended by adding new parties defendant, and notice thereof was served on the Kirchoffs about the 17th of that month. (Rec., 193, 112.) In

July, testimony was taken before the Master, and on the 30th of August, a decree was entered, confirming the report of the Master, and ordering a sale of the premises, except the portion theretofore conveyed to Mrs. Diversey. (Rec., 193.) The sale took place upon the 20th of October, 1880. The property was bid in, in parcels, by the company, for an aggregate amount of $92,000, that being about $1,000 less than the amount due. The two lots, of which a reconveyance at the aggregate price of $10,000 is sought in this suit, were bid in at $9,000 and $8,000, repectively. (Rec., 193.)

Meanwhile the Kirchoffs remained in possession of the homestead under their lease from the Receiver, appointed by the Federal court, and paying rent with about as much regularity as they had met their obligations to the company. No further proposition was ever made to the company for the redemption or repurchase of the homestead until the filing of the bill in this case.

During this interval two events occurred which are the real causes of this litigation. In the summer of 1880 Warfield was discharged from the Insurance Company's service, and in January, 1881, Kendall ceased to be its attorney. (Rec., 174.) Shortly thereafter a revival in real estate values came. (Rec., 91.)

When in October, 1881, the Receiver filed a petition for a writ of assistance to obtain possession of the premises, it met with an answer in which Kirchoff, acting, as is stated in the bill, as agent for defendant in error (Rec., 24), alleged that he was entitled to possession under and by virtue of an agreement entered into with the company as far back as 1878, whereby the company agreed to convey to him, or to any person he might name, the two lots upon the consideration of $10,000, in install-

ments of $1,000 each, to be secured by a mortgage thereon. (Rec., 107.) The court, upon a hearing, overruled this answer, and issued its writ of assistance. (Rec., 193.)

On the 21st of January, 1882, deeds for these premises were made to the company, and on the 12th of June following, the original bill in this case was filed.

Upon this statement of facts, the first and conspicuous point, which we desire to emphasize, is the fact that the negotiations upon which the defendant in error relies, were concluded by the refusal of the company on the 5th of November, 1879, to accept the proposition of the Kirchoffs. From this time on, then, the Kirchoffs knew that the foreclosure proceedings would continue, and would thenceforth, at least, be hostile to their interests. But the Kirchoffs made no answer to this foreclosure bill; they set up no defense in the foreclosure proceedings; and when the case was afterwards referred to the Master in Chancery, they presented no evidence, nor did they make any suggestion of a hostile claim, the case proceeding regularly to a decree. The property was sold, the Kirchoffs took a lease from the Receiver, and failing to pay rent, a writ of assistance was asked against them, and then, for the first time, the alleged agreement which was relied upon in this suit, saw the light. It was then urged that the Kirchoffs were not bound to pay rent for the reason that there was a contract between them and the Insurance Company by which they should buy the land which they then occupied for a certain sum. The agreement claimed, provided that rent paid to the Receiver should be applied upon the purchase price of the homestead (Rec., 97, 105), but the lease contained no such provision (Rec., 97), the rent being applied by the Receiver

upon the general indebtedness. The question was decided against them by the United States Court, a writ of assistance was issued, and they were ejected. Thereafter the time of redemption expired, Master's deeds were issued to the purchaser, and the title of the Insurance Company under decree of the Federal Court became absolute and indefeasible upon any ground which had been settled by the judgment of that Court.

The Record.

The present writ of error brings to this Court a complete record of all the proceedings of the State Courts in this case, from the filing of the bill in the Circuit Court, down to and including, the last decree of the State Supreme Court rendered on March 31, 1894. The finality of this decree cannot be questioned. The difficulties in this respect, therefore, which were presented upon the former hearing of this case (160 U. S., 374) no longer exist.

The history of the case as shown by the present record may be briefly traced as follows:

Upon the first hearing in the Circuit Court of Cook County the bill was dismissed for want of equity. (Rec., 30.) From this decree an appeal was prosecuted directly to the Supreme Court of Illinois, but was there dismissed on the ground that it should have been taken to the Appellate Court. (Rec., 299; 128 Ill., 199.) Thereupon a writ of error was taken from the Appellate Court of Illinois to the trial court, and upon the hearing of that writ, the Appellate Court reversed the decree of the Circuit Court, and the case was remanded for further proceedings in conformity with the opinion of the Appellate

Court. The order of reversal will be found in the record at page 301. The opinion of the Appellate Court filed in the court below is in the record at page 399. (33 Ill. App., 607.)

The Insurance Company considering this order of reversal, a final order, prayed an appeal from the decision of the Appellate Court, to the Supreme Court of the State. This appeal was granted by the Appellate Court. The Supreme Court took jurisdiction of the case, and upon the hearing affirmed the judgment of the Appellate Court; the order of affirmance and the opinion rendered at the same time, appearing in the record at page 305. (133 Ill., 368.)

To this judgment of the Supreme Court of Illinois a writ of error was directed from this Court, but upon the hearing was dismissed, on the ground that the judgment of the Supreme Court of Illinois was not a final judgment. (160 U. S., 374.) In the meantime the order of the Appellate Court, which directed an accounting, had been carried out and a decree, settling the accounts between the parties and allowing redemption was entered in the Circuit Court of Cook County, on the 26th of January, 1893. This decree stated that it was entered in accordance with the opinions of the Supreme and Appellate Courts. (Rec., 409.) From this decree the Insurance Company appealed to the Appellate Court, and the record on this appeal consisted of a transcript of the pleadings in the case and a stipulated statement of the evidence and record, made on the first hearing (being substantially a duplicate of that record), together with the record made after the case was remanded to the trial court for the accounting. Upon this record the Appellate Court affirmed the decree of the Circuit Court, the

order of affirmance appearing at page 511, and the accompanying opinion at page 514. (51 Ill. App., 67.) This judgment of the Appellate Court was affirmed by the Supreme Court, the order and opinion appearing in the record at page 515. (149 Ill., 536.) It is this double record which is thus brought before this Court by the present writ of error.

The jurisdiction of this Court over the present case is established when we show:

First. That a Federal question is involved.

Second. That this Federal question is presented on the record of the case.

Third. That the Federal question was decided by the State Court adversely to the title there claimed under Federal authority.

Fourth. That the Federal question is conclusive of the case.

The defense set up by the Insurance Company is based upon a title derived through judicial proceedings in the Federal Court.

Roby v. *Colehour*, 146 U. S., 153.
Embry v. *Palmer*, 107 U. S., 3.
Dupasseur v. *Rochereau*, 21 Wall., 130.

The portions of the record presenting the Federal question are found in the allegations of the bill, the defendant's answer thereto, and in the evidence upon this subject introduced by the Insurance Company.

The amended bill (Rec., 22–26) alleges that in 1871 Mrs. Kirchoff mortgaged several tracts of land to the Insurance Company; that in 1878, default having been made by the mortgagors in the payments called for by the mortgage,

foreclosure proceedings were instituted by the Insurance Company.

The bill then alleges that thereupon it was agreed between the parties that the mortgagor should convey all the mortgaged property to the Insurance Company, that the Insurance Company would receive this conveyance in full satisfaction of its debt, and that Mrs. Kirchoff should then have the right to "redeem from the trust deed" two tracts of land known as lots 2 and 4.

The bill then proceeds as follows:

"That afterwards, pursuant to the agreement aforesaid, your oratrix and her husband executed, acknowledged and delivered to said company a deed of release and quitclaim of all and singular the land and premises belonging to your oratrix, described in said trust deed, including the said lots hereinbefore specifically described, which said deed, as your oratrix is informed and believes, has since been recorded in the recorder's office of said county, and to said deed or the record thereof your oratrix prays leave to refer, if it be necessary so to do.

That thereafter, upon examination of the title to said lots, *it appeared that there were certain intervening liens and incumbrances upon the same*, created after the execution of said trust deed and prior to the agreement hereinbefore set forth for such *redemption* by your oratrix, and it was thereupon represented to your oratrix by said company through its attorney, that it would be necessary to foreclose said trust deed in order to make good title in said company to said lots of land before it could take mortgage thereof for said installments of *redemption* money, and it was thereupon agreed by and between the said company and your oratrix that the agreement for said *redemption* should not be further performed until after the title had been perfected in said company by said foreclosure proceedings, but the further execution thereof should be held in abeyance until after such foreclosure proceedings should be completed and the title to said lots become perfected in said company, discharged of such incumbrances, etc., and that in the meantime your ora-

trix should interpose no defense to such foreclosure proceedings.

And your oratrix further shows unto your Honors that the said company, in pursuance of said agreement, afterwards continued the prosecution of its suit in the Circuit Court of the United States for the Northern District of Illinois, for the foreclosure of said trust deed, and obtained a decree of foreclosure and sale, under and by virtue of which said decree said lots were afterwards, to wit: on the 20th day of October, A. D. 1880, offered for sale by the master in chancery of said court, and were sold and struck off to said company at said sale as follows, to wit: said lot two (2) for the sum of nine thousand dollars ($9,000), and said lot four (4) for the sum of eight thousand dollars ($8,000), and that deeds of said lots have since been issued and delivered to said company by the said master in chancery, and have been recorded in said recorder's office.

That in said suit for foreclosure the said company procured the appointment of a Receiver of all the land and premises involved in said suit, your oratrix making no defense to said suit, and that on, to wit: the 16th day of November, 1881, said Receiver demanded possession of said lot two (2), which was occupied by your oratrix and her husband as a homestead, and applied to said court for a writ of assistance to put him, said Receiver, in possession thereof.

That thereupon *your oratrix, through her said husband, resisted said application* for said writ of assistance, and set up as defense to the application of said Receiver an answer setting forth in substance the aforesaid agreement between said company and your oratrix, *but said company*, through its solicitors employed in said suit, *supported the application of said Receiver, and wholly disregarded its agreement with your oratrix* and procured order of said court for the assistance of said writ, whereby your oratrix and her husband were compelled to vacate their homestead.

And your oratrix well hoped that upon the execution and delivery of said master's deeds of said lots to said company (which said deeds were issued on or about the 21st day of January, A. D. 1882), the said company

would in good faith keep and perform its said agreement with your oratrix, and convey said two lots to your oratrix upon the terms aforesaid.

But now so it is the said Union Mutual Life Insurance Company utterly refuses to carry out its said agreement with your oratrix, and falsely and fraudulently *claims to hold and own said two lots of land in fee simple absolute, free and discharged of any equitable interest therein on the part of your oratrix*, and seeks to deprive your oratrix of her rights in the premises, and refuses to convey to your oratrix the said lots of land, or either of them, upon the terms agreed upon as aforesaid, and gives out and pretends that no such agreement was ever made or entered into between said company and your oratrix.

Whereas, your oratrix charges the contrary to be the truth, and that *she is justly entitled to redemption* of said lots, and a conveyance from said company upon the terms aforesaid.

And your oratrix further shows unto your Honors that she has in good faith kept and performed her part of said agreement, *for the redemption of said lots*, so far as she has been able to do, by the delivering of her said deed of release and quitclain to said company, and has refrained from interposing any defense to said foreclosure proceedings, in full faith and reliance that the said agreement would be kept and performed by said company, and that she has always been and is now ready and willing to keep and perform the whole of said agreement on her part to be performed.

All which actings, doings and pretenses of said company is contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your oratrix in the premises.

In further consideration whereof, and forasmuch as your oratrix is remediless in the premises at and by the strict rules of the common law, and is relievable only in a court of equity where such things are perfectly cognizable and relievable, to the end, therefore, that said Union Mutual Life Insurance Company may true answer make to all and singular the premises (but not under oath, the benefit whereof is expressly waived by your oratrix); that your oratrix *may be allowed to redeem*

said premises according to the terms of said agreement; that said defendant may be compelled by the decree of this court to perform the said agreement with your oratrix, and convey to her the said two lots of land hereinbefore specifically described, according to the terms thereof, as before stated, and account to your oratrix for the rents and profits of said premises since the date of said agreement, your oratrix being ready and willing and duly offering to perform the said agreement in all things on her part, and that your oratrix may have such other and further relief in the premises as the equities of her case may require and to your Honors shall seem meet."

The defendant demurred to this bill; the demurrer was overruled; the defendant then answered, admitting the foreclosure proceedings in the United States Court and its claim of title thereunder, reserving a demurrer in its answer, and upon hearing introduced in evidence the record of the foreclosure proceedings in the Federal Court. When it came to making up the record for appeal it was considered unnecessary by Mrs. Kirchoff's solicitors, who prepared the record, to incorporate therein a copy of all the papers filed in the foreclosure suit, and in their place was inserted a stipulation as follows:

"It is hereby stipulated that, for the purpose of rendering the record less voluminous, said papers may be omitted by the clerk in making up the record, and that the following stipulated statement of facts may be inserted in said record in lieu of said files, namely:

First. That the defendant company filed a bill in the United States Circuit Court for the Northern District of Illinois, upon the 11th day of July, 1878, for the purpose of foreclosing the deed of trust from Julius Kirchoff, Elizabeth Kirchoff and Angela Diversey to Levi D. Boone, dated May 8, 1871, which said deed of trust was given to secure the joint judgment note of said last three named grantors. Said bill sought to foreclose said trust deed as to all of the property therein mentioned (except that which had been previously released), including the

property involved in this suit, namely: lots two (2) and four (4), in block twenty-one (21), in the Canal Trustees' subdivision of the south fractional quarter of section three (3), township thirty-nine (39) north, range fourteen (14) east of the third principal meridian; that the bill also sought to correct an error in the description of the property in the trust deed belonging to Mrs. Diversey.

Second. August 9, 1878, an alias chancery subpœna, returnable the first Monday in September, 1878, was issued to all the defendants and service had upon the 10th day of August, as appears by the return of the marshal. It appears by said return that Elizabeth Kirchoff was served by leaving a copy of the subpœna with her husband.

Third. That on the 20th day of November, 1878, Angela Diversey, one of the defendants in said last named suit, filed her answer in said cause, in which she averred that the loan secured by said trust deed was not made to her, but that she became a party to the notes and trust deed solely as a surety for Julius Kirchoff, and she denies that there was any mistake in the description of the premises in the trust deed. She further averred that she was induced to execute said trust deed through the false representations of Julius Kirchoff, that is was to secure $5,000 only, and that the company was aware of the said misrepresentation and of the fact that she was thereby led to execute the trust deed, and denies that the defendant company have a right to recover from her any greater sum.

Fourth. That on the 11th day of November, 1878, there was entered an order in said cause reciting that said Julius Kirchoff, Elizabeth Kirchoff and other defendants being severally called to appear and make answer to the bill, and that none of them appearing, default was taken against them and the bill taken as confessed.

Fifth. That on the 16th day of November, 1878, there was entered in said cause an order appointing Edwin A. Warfield Receiver of certain of the property described in the trust deed, including the premises in question.

Sixth. That on or about the 6th day of September, 1880, the said Edwin A. Warfield, Receiver, filed a writ-

ten report in said cause, by which it appears that the said Julius Kirchoff paid him rent for the use and occupation of said premises.

It is further stipulated that thereafter the said Edwin A. Warfield, Receiver, resigned, and that James R. Page was appointed Receiver in said cause.

Seventh. That on the 28th day of October, 1881, the said James R. Page, Receiver, filed a petition representing that he had been appointed Receiver in said cause; that Julius Kirchoff was in possession of said lots two (2) and four (4) of block twenty-one (21) aforesaid, and that he refused to surrender possession of the same to said Receiver or to pay rent therefor. Said Receiver prayed for a writ of assistance to eject said Julius Kirchoff from said premises.

Eighth. That on the 28th day of October, 1881, the court entered an order upon said Julius Kirchoff to show cause within four days why he should not surrender possession of said premises to said Receiver.

Ninth. That on the 16th day of November, 1881, said Julius Kirchoff filed an answer to said rule; which answer is set out in the record immediately following the testimony of E. A. Warfield.

Tenth. That on the 16th day of November, 1881, the said court issued a writ of assistance, directing the marshal to put said James R. Page, Receiver, into possession of said premises.

Eleventh. That on the 17th day of January, 1880, the bill in said cause was amended, making Eben F. Runyan, of the State of Nebraska; Robert E. Jenkins, assignee in bankruptcy of said Runyan, and George W. Stanford parties defendant, and that on the 15th day of March, 1880, an order of default was taken against said last named defendant, and the case referred to Henry W. Bishop, Master in Chancery, to take proof.

Twelfth. That said Master in Chancery took testimony in said cause, and that on the 2d day of July, 1880, he filed his report, in which he found that the allegations of the bill were true and recommended a foreclosure of said deed of trust.

Thirteenth. That on the 30th day of August, 1880, there was entered in said cause a decree confirming said

Master's report and ordering said Master to make sale of the entire premises covered by said trust deed, except such parcels as had been theretofore released to Mrs. Diversey and others.

Fourteenth. That on the 29th day of October, 1880, the said Master filed in said cause his report, that in pursuance of said decree he did on the 20th day of October, 1880, make a sale of said premises as described in said decree; that the highest bid at said sale was by the complainant for the sum of $92,000, and that there remained unsatisfied under said decree the sum of $1,027.24; that said property was offered and struck off in separate parcels, the whole aggregating $92,000, and that said lot two (2) above described, was bid in for $9,000, and said lot four (4) for the sum of $8,000.

Fifteenth. That on the 24th day of February, 1881, there was entered in said cause an order confirming said Master's sale.

Sixteenth. That on the 21st day of January, 1882, the time for redemption having expired, the said Master made deeds to said complainant of the various tracts of land embraced in said deed of trust, including the premises in question.

Seventeenth. That on the 21st day of January, 1882, there was entered in said cause an order approving said Master's deeds."

The answer, filed by Mr. Kirchoff, as agent for defendant in error, to the Receiver's petition for a writ of assistance and verified by him under oath (Bill of Complaint, Rec., 24), is shown in the record, pages106-108, and is as follows:

"The undersigned, in response to the order heretofore entered herein, upon the petition of James R. Page, requiring him to show cause why a writ of assistance should not issue in said cause directing the marshal to put the Receiver in the above entitled cause in possession of the property in the bill described, says that the issuance of such a writ would be inequitable and unjust and calculated to prejudice the rights of the defendant Julius Kirchoff.

The undersigned begs leave to submit herewith the following statement of facts as grounds for resisting the application for said order.

Previous to the institution of any foreclosure proceeding in this case an agreement was entered into between the complainant and said defendant, whereby, for the consideration hereinafter named, said defendant was to quitclaim to said complainant his interest in certain of the property described in the bill of complaint, including lots 2 and 4, in block 21, Canal Trustees' subdivision in west half of the south-east quarter of section 3, township 39, range 14 east, said last described property being the homestead of said Kirchoff, and a lot near the same, in the vicinity of Rush and Pearson streets, and was to consent to a foreclosure on all of the property described in said bill. On behalf of the complainant it was agreed and distinctly understood with reference to the two pieces of property last described, that the same should be bid off at a sale to be made under the decree to be entered, at such sum as the complainant should see fit, and that after the same had been made, said Kirchoff should be entitled to a reconveyance of the two lots last above described upon payment to complainant of $10,000—that is to say, said complainant was to convey said two parcels of property to defendant Kirchoff, or to such persons as he should nominate, for a consideration of $10,000, in ten payments of $1,000 each, one thousand to be paid upon the tender by complainant to said Kirchoff of a deed of said property within one year from the date of the Master's deed to complainant under said decree, and the residue of the unpaid consideration of $10,000 was to be secured by a lien on the lots, and made payable in nine equal payments of $1,000 each, as aforesaid, and this respondent executed a quitclaim deed to said complainant in pursuance of said agreement.

The undersigned now avers that complainant regardless of its duties and obligations in the premises, and contrary to justice and equity, claims to own said property absolutely, and refuses to convey the same to the undersigned in pursuance of said agreement.

The undersigned further states that according to the terms of said agreement no deficiency decree was to be

entered, or if entered, the same was to be canceled without payment; that the undersigned is not indebted to said complainant in any sum whatever; that he has been willing and still is willing to faithfully fulfill his undertaking in the premises; that said property is worth a sum greatly in excess of $10,000, and that at the time of the foreclosure the property covered by the liens described in the bill was worth much more than all sums of money due from the undersigned to said complainant, and that he would not have executed said deed but for the agreement so made by said complainant to transfer to him the title to the said lots 2 and 4 upon the terms named.

Said Kirchoff further states that his solicitors have in course of preparation a bill in chancery, setting up the foregoing facts and *asking that complainant be required to execute its undertakings* in the premises, or in default thereof *that the decree herein be set aside and held for naught.*

The undersigned further states that he has frequently offered to perform and has at all times been ready and willing to perform said contract upon his part by the payment of $1,000 and the proper securing of the balance of said sum of $10,000 upon the execution and delivery to him by said complainant of a deed of said property, and he now here avers his readiness to perform said contract upon his part according to the terms of said agreement.

Inasmuch, therefore, as the complainant cannot be prejudiced by delay, your objector asks that no order of restitution be issued herein for a reasonable time at least."

The record, therefore, presents the question as to the claim of title made by the Insurance Company under the Federal decree and other proceedings of the Federal Court, and as to the jurisdiction of the State Court to review the decree of the United States Court. The question of the Insurance Company's claim of title under Federal authority was clearly presented by the allegations of the bill, and answer, and by introducing in evidence the record of

the foreclosure proceedings in the United States Court. It also appears from the record that the question of jurisdiction was presented to and passed upon by all the State Courts of Illinois, from the trial court to the Supreme Court. The question was first presented by a demurrer to complainant's bill; it was afterwards presented by the reservation of a demurrer in the answer, and upon this record was actually heard in the State Courts, and was passed upon in the opinion of the Supreme Court of the State. (Rec., 305.)

This is shown in the first place, by the fact that in order to render any decision in the case it was necessary for the State Courts to determine whether or not they possessed jurisdiction over the subject-matter of this controversy. The fact that a decree was entered in the State Courts was of itself an adjudication that those courts had jurisdiction to enter a decree. Furthermore, the opinion of the Supreme Court of Illinois, while dealing very briefly with the question, as, perhaps, was necessary in view of the authorities, and the evidence will, nevertheless, be found to have directly passed upon the subject. (Rec., 305.)

Justice CRAIG, in delivering the opinion of the Supreme Court, in deciding the question, says:

"It is also claimed that complainant's failure to assert the alleged agreement in the foreclosure proceedings is a bar to its assertion here, and that the proceedings in the foreclosure are conclusive. We are unable to concur in this position. It was a part of the arrangement under which the complainant was to obtain the two lots in controversy, that a decree of foreclosure should be entered, and that the premises should be sold under such decree. The decree was rendered and the sale made by consent, for the purpose of clearing the different tracts of land mentioned in the quitclaim deed from certain incum-

brances. The decree was not adverse to the interest of complainant but in harmony with her interest; she is not attacking the decree, but claiming the enforcement of an agreement under which it was rendered, and in our judgment there is no ground for holding that the rights of complainant were cut off or in any manner impaired by the decree." (Rec., 311.)

In its opinion on the last appeal, the Supreme Court of Illinois held that "the merits of the case were settled adversely to the company," by its former opinion to which reference has just been made, and, so far as the Federal question is concerned, the last opinion was merely an affirmance of the former. (Rec., 516.)

It therefore clearly appears from the foregoing:

First. That the bill in this case recited the foreclosure proceedings in the United States Court and alleged that defendant claimed to hold an absolute title to the lots in question, by virtue of these proceedings and of the Master's deeds obtained thereby. (A title claimed under an authority exercised under the United States.)

Second. That the defendant answered, reserving therein the advantage of a demurrer, and admitting and averring the claim of absolute title under the Federal decree and deeds.

Third. That the defendant introduced in evidence the record and decree of the Federal Court in support of the title which is thereby claimed.

Fourth. That a Federal question was thereby raised on the record in the State Court by the pleadings and proof.

Fifth. That any decision of the case necessarily involved passing on this claim of title, and the decision of this question.

Sixth. That the opinion of the Supreme Court of Illinois shows that the question was actually passed upon by that court.

Seventh. That the necessary effect of the decree and judgment of the State Court was against the right and title claimed by the defendant under Federal authority.

The present writ of error is thus brought, not only within the letter, but also within the spirit of section 709 of the Revised Statutes, as that section has been construed and applied in numerous cases by this Court.

Harris v. *Dennie*, 3 Peters, 292.
Davis v. *Packard*, 6 Peters, 41.
Crowell v. *Randall*, 10 Peters, 368.
Murdock v. *City of Memphis*, 20 Wall., 590.
Dupasseur v. *Rochereau*, 21 Wall., 130.
Murray v. *Charleston*, 6 Otto, 432.
Embry v. *Palmer*, 107 U. S., 3.
Factor's Ins. Co. v. *Murphy*, 111 U. S., 738.
Crescent Co. v. *Butchers' Union Co.*, 120 U. S., 141.
Roby v. *Colehour*, 146 U. S., 153.
Dowell v. *Applegate*, 152 U. S., 327.
Stanley v. *Schwalby*, 162 U. S., 255.

Among the more recent cases in which this Court has taken jurisdiction, under circumstances similar to those in the case at bar, may be cited the case of *Roby* v. *Colehour*, 146 U. S., 153, and *Dowell* v. *Applegate*, 152 U. S. 327. In the former case the grounds for the jurisdiction of this court were much less apparent than in the case at bar. In that case it did not appear, either from the

opinion of the court of original jurisdiction, or the opinion of the Supreme Court of Illinois, that either court passed upon any question of a Federal nature, the facts with reference to the questions decided by the State Court appearing in the record in the shape of a certificate of the chief justice of the State Supreme Court. In the course of the opinion of this Court in the Roby case, Mr. Justice HARLAN, speaking for the Court, said:

"But although it does not appear from the opinion of the court of original jurisdiction or the opinion of the Supreme Court of Illinois, that either formally passed upon any question of a Federal nature, the necessary effect of the decree was to determine, adversely to Roby, the rights and immunities claimed by him, in the pleadings and proof under the proceedings in bankruptcy to which reference has been made. * * * Our jurisdiction being invoked upon the ground that a right or immunity specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment. The present case may be held to come within this rule. In view of the certificate by the Chief Justice of the state court the office of which, as said in *Parmelee* v. *Lawrence*, (11 Wall., 36), was, as respects the Federal question, 'to make more certain and specific what is too general and indefinite in the record,' we are not disposed to construe the pleadings so strictly as to hold that they did not sufficiently set up and claim the Federal rights which that certificate state were claimed by Roby, but were withheld, and were intended to be withheld from him by the court below."

In the case of *Dowell* v. *Applegate*, above cited, this court said:

"From this history of the litigation between the parties, it appears that Dowell, in his answer to this suit, asserted his right to the forty acres in dispute under and by virtue of the decree in the proceedings in the Circuit Court

of the United States. That right having been denied by the judgment of the Supreme Court of Oregon affirming the judgment of the Circuit Court of Douglas County, *it is necessary to inquire—*

"First, whether the decree and proceedings in the Federal court were, as claimed, void for want of jurisdiction to hear and determine the suit which was instituted by Dowell in the Circuit Court of Douglas County, Oregon, and was subsequently removed into the Circuit Court of the United States for the District of Oregon;

"Secondly, whether if such decree and proceedings were not void, the State court gave due effect to them when adjudging that Dowell took nothing by his purchase of the lands in dispute under that decree.

"If these questions be determined in favor of Dowell, then the judgment below was erroneous in that it denied a right specially set up and claimed by him under authority of the United States."

In the case of *Dupasseur* v. *Rochereau*, 21 Wall., 130, this Court said:

"Where a State court refuses to give effect to the judgment of a court of the United States, rendered upon the point in dispute and with jurisdiction of the case and of the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing a Circuit Court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States, as defined by the constitution; and it is clearly within the chart of appellate power given to this court over cases arising in and decided by the State courts."

ASSIGNMENT OF ERRORS.

1. The Supreme Court of the State of Illinois erred in that its findings and judgment are contrary to the law.

2. The Supreme Court of the State of Illinois erred in that its findings and judgment are contrary to the evidence.

3. The Supreme Court of the State of Illinois erred in affirming the judgment of the Appellate Court and the decree of the Circuit Court of Cook County, Illinois.

4. The Supreme Court of the State of Illinois erred in holding that the defendant in error was entitled to redeem.

5. The Supreme Court of the State of Illinois erred in holding that the Circuit Court of the said State of Illinois had jurisdiction to set aside. modify and impair the title acquired by plaintiff in erroor under the judicial authority of a Court of the United States.

6. The Supreme Court of the State of Illinois erred in holding that the State Courts had jurisdiction to enter a decree for redemption from the trust deed after the said trust deed had been foreclosed by the decree, orders, and authority of the United States Court.

7. The Supreme Court of the State of Illinois erred in holding that the defendant in error was entitled to a decree of redemption in the State Courts from the judicial sale made under the decrees and authority of the United States Court.

8. The Supreme Court of the State of Illinois erred

in that no agreement, such as it found, for redemption was in fact made.

9. The Supreme Court of the State of Illinois erred in holding that such an agreement had the effect of undoing the decree, sale, and acts of the United States Court to the extent of permitting a redemption the same as if such decree, sale and acts were not in existence.

10. The Supreme Court of the State of Illinois erred in deciding against the title, right, and privilege claimed by the plaintiff in error under authorities exercised under the United States.

11. The Supreme Court of the State of Illinois erred in holding that the order and judgment of the Circuit Court of the United States, on the application of the plaintiff in error for a writ of assistance, was not an adjudication of the questions involved in this suit.

12. The Supreme Court of the State of Illinois erred in holding that the present action was not barred by the foreclosure proceedings in the United States Circuit Court.

13. The Supreme Court of the State of Illinois erred in that its judgment or decree does not give full faith, credit, and effect to the decree, proceedings, and acts of the United States Circuit Court under which plaintiff in error acquired title to said premises.

14. The Supreme Court of the State of Illinois erred in entering a decree which is a direct and positive interference with the rightful authority of the United States Court for the Northern District of Illinois. (Rec., 6, 7.)

BRIEF.

I.

THIS IS A BILL TO REDEEM FROM A MORTGAGE WHICH HAD BEEN PREVIOUSLY FORECLOSED IN THE FEDERAL COURT. SUCH A BILL IS NECESSARILY A BILL TO REVIEW THE FORECLOSURE DEREE AND IS BEYOND THE JURISDICTION OF THE STATE COURTS TO ENTERTAIN.

a. The subject matter of the bill makes out a bill of review.

Randall v. *Howard*, 2 Black, 585.
Nougue' v. *Clapp*, 101 U. S., 551.
Graham v. *R. R. Co.*, 118 U. S., 161.
Ras v. *Hulbert*, 17 Ill., 572.
Frisby v. *Withers*, 61 Tex., 134.

b. The bill does not state such a case as may be the subject of an original bill to set aside a decree for fraud.

Gaines v. *Fuentes*, 92 U. S., 10.
Barrow v. *Hunton*, 99 U. S., 80.
Johnson v. *Waters*, 111 U. S., 640.
Arrowsmith v. *Gleason*, 129 U. S., 86.

c. It was a part of complainant's case to allege and prove that the facts now relied upon for relief, could not have been brought forward in defense of the previous suit. In the absence of such allegation and proof, the present bill is merely a bill for a re-hearing.

Marshall v. *Holmes*, 141 U. S., 589.
Avery v. *United States*, 12 Wall., 304.

II.

THE FACT THAT THE PROCEEDINGS IN THE STATE COURTS REVIEW THE FEDERAL FORECLOURE DECREE, IS SHOWN BY THE EFFECT OF THE DECREE OF THE STATE COURTS UPON THE FEDERAL DECREE.

a. *The only fraud charged in complainant's bill is that she conspired with the Insurance Company to defraud her creditors; the bill states an illegal agreement.*

Randall v. *Howard*, 2 Black, 585.
Dent v. *Ferguson*, 132 U. S., 50.
Connolly v. *Cunningham*, 5 Pac. Rep., 473.

b. *To give effect to this agreement by a decree of the State Court would be to impose upon the Federal foreclosure decree, an operation which would be illegal under Federal law, and which the Federal Court would not permit, if it had full control of its own decree.*

III.

THE FEDERAL DECREE OF FORECLOSURE IS CONCLUSIVE OF THE MATTER LITIGATED IN THE PRESENT SUIT.

a. *Assuming the existence of the agreement found by the State Courts, nevertheless the evidence shows that ten months before the decree in the Federal Court was entered, the Insurance Company notified the defendant in error that it refused to recognize the contract which she claimed.* (Rec., 152, 159; 41, 297.)

There are no findings made by the State Court upon the proposition last stated, and the fact being shown from the evidence without substantial contradiction, this Court will look at the evidence in determining the legal questions thus presented.

Dushane v. *Beall*, 161 U. S., 513.
Stanley v. *Schwalby*, 162 U. S., 255.

There must have been some way by which the Insurance Company could procure a judicial determination of the dispute which thus arose during the progress of the foreclosure proceedings, and the course which it adopted of notifying the defendants, pending the foreclosure, that it denied the contract, was an effective course.

b. *It was the duty of the Kirchoffs, at once upon the repudiation by the Insurance Company of the contract claimed, to interpose their defense in the foreclosure proceeding, if they had any. Having failed to do so, they are precluded by the Federal decree, from setting up claims which existed before that decree.*

Dowell v. *Applegate*, 152 U. S., 327.
Aurora v. *West*, 7 Wall., 82, 102.
Cromwell v. *County of Sac*, 94 U. S., 351.
Case v. *Beauregard*, 101 U. S., 688.
Dimock v. *Revere Copper Co.*, 117 U. S., 559.
Mally v. *Mally*, 52 Ia., 654.
Bailey v. *Bailey*, 115 Ill., 551, 557.
Rogers v. *Higgins*, 57 Ill., 244, 247.
Harmon v. *Auditor*, 123 Ill., 122.
Stickney v. *Goudy*, 132 Ill., 313.
May v. *Coleman*, 84 Ala., 325.
Jones v. *Vert*, 121 Ind., 140.
Adan v. *Mergenthein*, 114 Ind., 303.
Caldwell v. *White*, 77 Mo., 471, 473.
Shelbina Hotel Assn. v. *Parker*, 58 Mo., 327.

IV.

THE DECISION OF THE UNITED STATES COURT UPON THE APPLICATION FOR A WRIT OF ASSISTANCE, IS CONCLUSIVE OF THE PRESENT CASE.

a. *The matter presented to the Federal Court upon the hearing of the petition was precisely the question which was presented to the State Courts, namely: Whether the Insurance Company had made the agreement claimed, and what effect, if any, should be given to such an agreement.* (Rec., 106, 107; 23, 24.)

b. *The bill in this case shows that the parties before the court were the same in both cases.* (Rec., 24.)

c. *The United States Court had jurisdiction.*

Minn Co. v. *St. Paul Co.*, 2 Wall., 632.
Freeman v. *Howe*, 24 How , 450.
Randall v. *Howard*, 2 Black, 585.

V.

THE FEDERAL QUESTION IS CONTROLLING. NO OTHER QUESTION IS INVOLVED WHICH IS DECISIVE OF THE CASE.

(Rec., 317, 318, 400; 305, 311.)

ARGUMENT.

I.

THIS IS A BILL TO REDEEM FROM A MORTGAGE WHICH HAD BEEN PREVIOUSLY FORECLOSED IN THE FEDERAL COURT. SUCH A BILL IS NECESSARILY A BILL TO REVIEW THE FORECLOSURE DECREE AND IS BEYOND THE JURISDICTION OF STATE COURTS TO ENTERTAIN.

The present bill seeks to subject to a trust, in favor of the defendant in error, the apparently absolute title to the land in question, which the Insurance Company acquired, through foreclosure in the United States Court.

Such a bill as this is either a bill to review the foreclosure decree, or a bill to set aside that decree for fraud.

On its face the decree is absolute, and purports to give to the Insurance Company a title which is subject to no other interest whatever. When Mrs. Kirchoff seeks to subject this absolute title to a trust in her favor, she is seeking to deprive the Insurance Company of the full benefit of its decree. It is no answer to say, as the State Courts of Illinois have said, that "she is not attacking the decree, but seeking the enforcement of an agreement under which it was rendered"; for if the agreement deprives the decree of the effect which the court gave it, and if it deprives parties to the suit, of rights which the court gave them, the enforcement of the agreement necessarily involves an attack upon the decree.

The subject-matter of a suit in chancery is the equitable rights of the parties. These rights are settled by the decree, and thereafter, *so long as the decree stands*, each

party has what the decree has awarded him. To ask that rights awarded to one party should be taken from him and given to another party, would be to attack the decree, and the same would be true, if it were sought to deprive a party of the benefit of his decree, by asking that his rights thereunder should be made subject to a trust in favor of another party.

Any prayer that asks that one party be given either the rights, or the benefit of the rights, which were by decree awarded to another, involves an attack upon the decree. This the defendant in error seeks to do by original bill, and her bill must, therefore, be either a bill of review or a bill to set aside the foreclosure decree for fraud.

The first question raised by the present writ of error is, therefore, as to the character of the bill. If it is a bill of review, the State Courts had no jurisdiction to entertain it. As a bill to set aside the decree for fraud, it might, under some circumstances, and if it contained proper allegations, be within the jurisdiction of the State Courts.

Fraud vitiates the most solemn transactions, and when a judgment or decree has been procured thereby, equity, acting upon the person, may compel the surrender of that which has been wrongfully obtained. Under some circumstances, therefore, an original bill may be filed in one court, to set aside a decree previously obtained in another court. The jurisdiction is, however, subject to some necessary limitations, and the first of these is that the fraud complained of must be extrinsic to the issues in the first suit. Equity will not grant a mere rehearing of issues which were, or by proper diligence could have been, fully determined in the first suit. If a rehearing be all that is

sought, it must be given, if at all, by some court having jurisdiction to review the original decree.

It follows then, that any original bill, which seeks to set aside, as fraudulent, the decree of another court, must show, not only that the defendant was guilty of actual fraud, in procuring the decree complained of, but must also show that the complainant's knowledge of the facts constituting this fraud, was derived too late, either to prevent the entry of the decree, or to support an application to set the decree aside. An original bill which failed to make this showing would be nothing more than a suit to obtain a rehearing.

In the present case the bill of complaint filed by Mrs. Kirchoff falls within this principle. It brings forward a number of facts, which, if true, might have been a good defense, in the foreclosure suit, against the entry of any inconsistent decree. It does not allege fraud, extrinsic to the issues in that case.

Furthermore, there is no allegation in the bill as to when the complainant acquired her knowledge of the facts which are now brought forward. The agreement stated is said to have been made, shortly after the foreclosure bill was filed, and in the absence of allegations that the knowledge of the fraud was acquired by the complainant, too late to be set up in the foreclosure suit, the bill states no case of which the State Court could take jurisdiction. No assumption can take the place of this allegation.

In considering the decisions of this Court upon the question, we shall take up, in the first place, cases similar to the one at bar, in which the Court has held that the bill under examination was a bill of review, and we shall hope to show, from these cases, that the bill filed by the

Kirchoffs, in the present case, was a bill of that character.

In the second place, we shall consider a number of cases in which this court has defined the circumstances under which an original bill may be filed, to set aside a decree for fraud, and as a result of such examination, we shall hope to show that the bill is not of this character, and was, therefore, beyond the jurisdiction of the State Courts.

The case which bears the most resemblance to the case at bar is *Randall* v. *Howard*, 2 Black, 585. That was a bill filed in the Circuit Court of the United States for the District of Maryland, and sought relief from a foreclosure decree, rendered by a court of that State. The ground for the relief asked was an alleged agreement, made before the decree in the State Court, similar to the agreement which is claimed in the case at bar, that the foreclosure should be proceeded with, in pursuance of a "friendly arrangement," that the property should be bought by the complainant in the foreclosure suit and held by him, ostensibly for himself, but really as security for the indebtedness determined by the decree. The bill charged that the sale took place and the defendant was the purchaser ("the friendly arrangement" continuing), and that the property sold for less than its value, on account of the general understanding that the sale was merely a formal one, and not made to divest the estate of the complainants (mortgagors). That the sale was ratified without objection from the complainants, under the assurance from the defendant that the property should, notwithstanding the ratification, stand as a security for the amount agreed, which was to be paid in installments; that to perfect the form of sale and to make it conform to

the ostensible title of the purchaser, the complainant rented the property of the defendant. That, having obtained an apparent title, the defendant fraudulently determined to act as if he was the real owner, and was claiming a right to sell, and that the defendant in furtherance of his object had, by process through the sheriff of the State Court, dispossessed the complainant. The prayer of the bill was to restrain the defendant from disposing of the lands, and for the sale of so much as might be necessary to pay off the defendant, according to the understanding prior to the sale, and that the residue of the lands be conveyed to the complainant.

It was claimed in that case, as in the case at bar, that the decree was entered by consent and in pursuance of a "friendly arrangement", or, as it has been stated in the case at bar, that "the decree was not adverse to the interest of the complainant, but in harmony with her interest; she was not attacking the decree, but claiming the enforcement of an agreement under which it was entered." In discussing the case this Court said:

"Has this court jurisdiction? A conflict of jurisdiction is always to be avoided. Mr. Justice GRIER in *Peck* v. *Jenness* (7 How., 624), says: 'That it is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court.'

'These rules have their foundation not merely in comity but on necessity. For if one may enjoin, the other may retort by injunction and thus the parties be without remedy, being liable to a process for contempt in one, if they dare to proceed in the other.'

The bill in this case brings in review various matters passed on in the progress of a suit by the Cecil County Circuit Court, a court of general jurisdiction, having

complete control of the parties and of the subject-matter of controversy.

It seeks to annul the sale of lands made by virtue of a decree of the Cecil County Court, sitting as a court of equity in a case pending between these same parties; to affect the distribution of the proceeds of the sale; to enjoin the defendant from making any disposition of the lands purchased by him; to disturb his possession; to invalidate his title, and to have the mortgaged property resold.

This is a direct and positive interference with the rightful authority of the State Court.

If there was error in the proceedings of the court, a review can be had in the appellate tribunals of the state. If, as is charged, the decree is sought to be perverted and made the medium of consummating a wrong, then the court, on petition or supplemental bill can prevent it."

It seems that there is no escape for defendant in error from the effect of this decision. The present case is "upon all fours" with the case to which reference is made. The decision was upon the very matter which is here presented, and supports the contention which the Insurance Company has made throughout the litigation. To the same effect see, also, *Nougué* v. *Clapp*, 101 U. S., 551, in which the case of *Randall* v. *Howard*, was approved and applied under very similar circumstances.

In that case the plaintiff Nougue' filed a bill in the United States Circuit Court for the District of Louisana, setting out certain proceedings of the State Court of Louisiana under which real property, on which Nougue' held a mortgage had been sold free of his lien.

The bill alleged that Clapp, being the owner of certain land, sold it to Nougue' who gave a purchase money mortgage for part of the consideration. Nougue' then sold the land to Schexueyder Bros., who assumed the payment of the purchase money mortgage, and, in addition,

gave Nougue' a second mortgage on the land for over $14,000; that Schexueyder Bros. having paid the mortgage to Clapp, entered into a fraudulent conspiracy with him, to have the property sold under the purchase money mortgage, for the purpose of freeing the land from the junior incumbrance to Nougue'. The bill then states the institution of foreclosure proceedings in a State Court; that Nougue' had not sufficient notice of the pendency of these proceedings, until after the order of sale had been entered, and that he then made an ineffectual effort to stay the same.

The property being sold, Nougue' filed his bill in the United States Court, charging that the foreclosure proceeding was fraudulent and void as against him.

It will be seen, therefore, that the case would have been parallel with the case at bar, if the present bill, instead of being filed by Mrs. Kirchoff, had been filed by one of her creditors, holding a junior incumbrance upon her land. In this respect the case stated by Nougue' was a much more favorable case for the plaintiff than the case made by the bill in *Randall* v. *Howard*, or in the case at bar, for in both of these cases the plaintiff has admitted participation in a fraudulent conspiracy, while in *Nougué* v. *Clapp*, the plaintiff had no connection with the fraudulent agreement and was an injured and not an injuring party.

In passing upon this subject the Court held that the subject-matter of Nougue''s bill of complaint, was not within the jurisdiction of any other court, than that which had rendered the decree of which complaint was made. The order of the Circuit Court, dismissing the bill of complaint, was, therefore, affirmed.

We recognize the doctrine established by a number of cases in this Court, which hold that where an unsuccessful party to a suit has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him from court, or by a "false promise of compromise," an original bill may be filed, in equity, to impeach the decree thus obtained, and this in substance was the statement made by this Court, in *United States* v. *Throckmorton*, 98 U. S., 61.

It is clear, however, that it is not every false promise of compromise that constitutes such a fraud as may be made the subject of an original bill in equity; for in the case of *Randall* v. *Howard*, there was an agreement for compromise existing between the parties at the time decree was entered, and in the third volume of the reports of this Court after the *Throckmorton* case, we find *Nougué* v. *Clapp*, 101 U. S., 551, in which *Randall* v. *Howard* was approved, and its doctrine applied to another case where there was an existing agreement for a compromise between the parties, at the time that an inconsistent decree was entered.

These cases, therefore, show the necessary limitation upon the broad statement of the rule, viz: *that it is only where relief could not have been had in the first suit, that the fraud may be made the subject of a second suit.*

The statement in the *Throckmorton* case was that where a defendant has, by a false promise of compromise, been prevented from setting up his defense in the first suit, "a new suit may be sustained to set aside and annul the former judgment or decree *and open the case*, for a new and fair hearing." Where, however, the defendant had opportunity in the original suit to move to set the decree aside, he does not need the interposition of equity to

"open the case" for him. The case is already open and he cannot let his opportunity go by, *for the purpose of setting up his claims elsewhere.* It is his duty to make his defense in the original suit, so far as possible, and where fraud comes to his knowledge after decree, it is his duty to make immediate application, to have the decree, complained of, set aside. In the case of injunctions to restrain the collection of judgments at law, it is well established that,

"Courts of equity will not entertain a bill for an injunction upon an alleged ground that the original demand was unconscientious * * * provided it is competent for the party to have laid those grounds before the jury, on the trial, *or before the court of law upon the motion for a new trial.*" (Story Eq. Jur., Sec. 895.)

The same rule is applied in the case of bills to set aside decrees in equity, and is very clearly stated in *Graham* v. *Boston, Hartford & Erie R. R. Co.*, 118 U. S., 161, 177.

That was a case where an original bill was filed in the United States Circuit Court for the District of Massachusetts to set aside, on the ground of fraud, a foreclosure decree of a State Court; the bill was dismissed by the Circuit Court and in passing upon the case, this Court quoted, with approval, from the opinion of the Circuit Court as follows:

"'To avoid the effect of the foreclosure, the bill charges that the Ellis suit was the result of a fraudulent conspiracy on the part of Ellis, the plaintiff, Lane, the president of the company who represented it in its defense, and the receivers and trustees appointed by the court, entered into for the purpose of embarrassing the company and depriving it of its road and property; and that this fraud was perpetrated by submitting to the court false statements of facts for its decision, and thus obtaining a decree against the company. *The obvious inquiry arises, at this stage*

of the case, why the plaintiff has not brought to the attention of the State Court the fraud alleged to have been practiced upon it, and there sought to have the foreclosure decree revoked. In *Nougué* v. *Clapp*, 101 U. S., 551, it was held that a Circuit Court of the United States cannot revise or set aside a final decree rendered by a State Court which had complete jurisdiction of the parties and subject-matter, upon the ground that the decree was obtained by fraud, *where the injured party has had an opportunity to apply to the State Court to reverse the decree.* The plaintiff is a party to the foreclosure suit, as a shareholder in the old corporation. The State Court is still open to listen to the complaint of the corporation and its shareholders. The decree of foreclosure, though final in one sense, as determining the respective rights of the parties to the property in question, is still in its nature interlocutory and is open to review by the court upon petition or motion in the cause or by bill of review for good cause shown. Story Eq. Pl., § 421, and note; *Evans* v. *Bacon*, 99 Mass., 213; Mass. P. S., Ch. 151, § 12. The plaintiff has, therefore, an ample and complete remedy for all his alleged grievances, in the State Court, and there is no occasion for his application to this court for relief by bill in equity. The decree of foreclosure, therefore, now in full force and unrevoked, is a bar to this suit.' These views, so well expressed, are conclusive of this branch of the case, and require nothing more to be said."

The same rule is, also, announced in other courts.

Rae v. *Hulbert*, 17 Ill., 572, was an action of debt upon a judgment of the Supreme Court of the State of New York commenced in the Cook County Court of Common Pleas. It was pleaded that the judgment was obtained by fraud in that when the defendant was ready for trial in the case in which the judgment was entered, he was induced by negotiations with the plaintiff to send away his witnesses; that, confiding in the false pretenses and fraudulent representations made by the plaintiffs and being deceived thereby, he dismissed his witnesses and al-

lowed them to depart, and departed himself a distance of three hundred miles, and the plaintiffs then took judgment against him. The court says:

"To this plea a demurrer was sustained, and we think very properly. *In this there is no such fraud set out as would vitiate a judgment.* The agreement for the settlement of the suit was a matter properly cognizable before that court, and should have been interposed for the purpose of postponing the trial before the referee, or should have been objected to the report when judgment was moved thereon, or *if for any cause, the defendant could not then present the objection, he should, at the earliest opportunity, have applied to that court to open or set aside the judgment and enforce the agreement to settle, or to let him in with a defense.*"

In the case of *Frisby* v. *Withers*, 61 Texas, 134, we find a case of remarkable similarity. In that case Withers claimed title to certain land as against Frisby and Gibson, by virtue of a judgment rendered in a state court of Texas. Defendants Frisby and Gibson alleged that the judgment was rendered upon a compromise agreement, made between them and the plaintiff's attorney in that suit, to the effect that Frisby and Gibson were to have conveyed to them the land claimed by them. It was alleged that these defendants had taken all necessary steps to defend the suit, as plaintiff knew; plaintiff was apparently afraid of the effect of this defense, and therefore agreed that if these defendants, Frisby and Gibson, would let the judgment go by default, the plaintiff would make them deeds to the tract of land claimed by them.

Upon this defense the court held that the judgment in favor of Withers was binding upon the defendants and all claiming under them, and the decision of the court was that, "Under the facts pleaded by these defendants, the judgment was not void and *could only be set aside, if*

at all, by a direct proceeding for that purpose. * * * Under such facts the court did not err in excluding the evidence which was offered for the purpose of attacking that judgment."

Coming now, in the second place, to those cases in which this Court has defined the circumstances under which an original bill may be filed to set aside a decree for fraud, we find here again, in another form, a restatement of the rules laid down in *Randall* v. *Howard*, *Nougué* v. *Clapp* and *Graham* v. *R. R. Co.*

Some leading cases on the subject of original bills to set aside decrees for fraud are, probably, *Gaines* v. *Fuentes*, 92 U. S., 10; *United States* v. *Throckmorton*, 98 U. S., 81; *Barrow* v. *Hunton*, 99 U. S., 85; *Johnson* v. *Waters*, 111 U. S., 640; *Arrowsmith* v. *Gleason*, 129 U. S., 86; *Marshall* v. *Holmes*, 141 U. S., 589. In all these cases the Court emphasizes the proposition that equity will not, upon original bill, grant a rehearing of issues which have once been determined, and that where a bill to set aside a decree for fraud, fails to show that the facts, said to constitute the fraud relied on, were unknown to complainant, in time to be used in the original suit, it fails to make out a case for a second suit. Thus in *Johnson* v. *Waters*, the Court says:

"This court would not try over again a case already tried, nor permit the complainant to litigate matters which he had notice of, and which he had an opportunity to litigate in the probate proceedings."

In *Barrow* v. *Hunton*, 99 U. S., 80, 83, the Court says that such a bill must present "the investigation of a new case arising upon new facts," a phrase which is very similar to a phrase used in *Arrowsmith* v. *Gleason*, and approved in *Marshall* v. *Holmes*. In the case last mentioned, in commenting upon other cases, the Court said:

"In *Nougué* v. *Clapp*, *it did not appear*, *nor was it alleged*, *that* the facts constituting the fraud were not, before the rendition of the decree, within the knowledge of the party seeking its annulment, *or could not have been discovered in time to bring them in some appropriate mode to the attention of the court while the decree was within its control*. For aught that appears, that suit was brought simply to obtain a rehearing in the Circuit Court of the United States, sitting in equity, of issues that were, or, by proper diligence, could have been, fully determined in the suit at law, in the State Court. The relief there asked could not have been granted, consistently with the rule that equity will not interfere with a judgment at law, even where the party has an equitable defense, if he could, by the exercise of diligence, have availed himself of that defense in the action at law to which he was a party. This requirement of diligence is, as it ought to be, enforced with strictness." (p. 600.)

The result of the examination of these cases shows, therefore, that where a party to a suit suffers any injury by the fraud of another party, it is his duty to ask relief, if possible, in the pending proceeding, and it is only in cases where this was impossible that any other court can have jurisdiction or give relief.

It is, therefore, part of complainant's case in setting out the facts of fraud, which constitute his case, both to allege in his bill and to show by proof, that these facts upon which his claim to relief depends, were not within his knowledge before the rendition of the decree complained of, or could not have been discovered, in time to bring them to the attention of the court, while that decree was within its control. Unless the bill contains these allegations, it states nothing more than an application to a court of equity to grant a rehearing of issues that have been fully determined.

Marshall v. *Holmes*, 141 U. S., 589, 600.

In *Avery* v. *United States*, 12 Wallace 304, this principle was applied to the case of a petition for a writ of *audita querela* to open up a judgment at law. In this case the petition alleged that the facts relied upon were unknown to the petitioner at the time the judgment was entered and his testimony supported this allegation. The court held, however, that the petitioner had failed to show that by due diligence he might not have learned the fact in time to have set up his defense in the original proceeding. "It was his business to have informed himself on the subject," the court said, and upon this ground of failure of proof the petition was denied.

In the case at bar, the bill contains no explicit allegation that the facts, upon which Mrs. Kirchoff now relies, were unknown to her at the time the Federal decree was entered. It is not probable that in the absence of such an allegation, its place could be taken by inference or any indirect conclusions from other statements. It is essential that the pleader should make a case by a positive and explicit allegation of every material fact. Mrs. Kirchoff's bill, however contains no allegation from which any reasonable inference of ignorance can be drawn. The bill states that an agreement was made in 1878, and that the Insurance Company refuses to carry out this agreement and claims to hold the land "free and discharged of any equitable interest therein on the part of your oratrix," and "gives out and pretends that no such agreement was ever made and entered into between the said company and your oratrix." The important question which is presented upon the reading of these allegations as to *when* the company first refused to carry out this agreement; and *when* it first claimed to hold the land free of any equitable interest;

and *when* it first gave out and pretended that no such agreement was made—these questions the bill does not answer. Of course the company *might* have refused to recognize the alleged agreement at any time after it was supposed to have been made. The company *might* have repudiated every obligation which Kirchoff was trying to foist upon it, at once and as soon as it knew of his claim. The allegations of the bill tell nothing whatever of the actual facts of this important matter.

We shall show in another part of this argument that all the substantial facts upon which the claim for relief depends, were, if ever, known to complainant ten months before the foreclosure decree was entered; but at this point we are considering, not the evidence, but the complainant's case as made in her bill.

This case consists of a statement of a contract, under which Mrs. Kirchoff claims an equitable interest in the property in controversy, and by which the Insurance Company was not to acquire an absolute interest at the foreclosure sale, but was to acquire that interest subject to an obligation to convey to complainant on certain terms.

Any person making such a contract, knowing that it concerned the equitable rights which were involved in the pending foreclosure suit, and that the purpose and function of the decree in that suit would be to state those rights as they existed at the date of the decree, must necessarily have expected that the contract would be recognized by the decree.

It follows, therefore, that when the Insurance Company procured the entry of a decree which failed to recognize this agreement, then, if never before, the Insurance Company had committed a breach of its obligations. It was,

therefore, the duty of the defendant in error to act at once and have that decree set aside. This she failed to do.

In the proof offered under this bill it appeared that the Kirchoffs not only neglected to set up, as a defense in the foreclosure suit, their supposed agreement with the Insurance Company, but after the decree had been entered without reference to the agreement, they lay by and permitted the sale under that decree to be had; they permitted the Insurance Company to purchase for $17,000, land which they insisted they had a right to buy back for $10,000; they offered no objection when the sale was confirmed; even after the filing of the petition for a writ of assistance, they failed to ask relief in the United States Circuit Court, and their only excuse is that "*said Kirchoff further states that his solicitors have in course of preparation, a bill in chancery, setting up the foregoing facts and asking that complainant be required to execute its undertakings in the premises, or in default thereof, that the decree herein be set aside and held for naught.*" (Rec., 107.)

Upon the authority of *Randall* v. *Howard*, *Nougué* v. *Clapp*, *Graham* v. *Boston*, *Hartford & Erie R. R. Co.*, and *Marshall* v. *Holmes*, we submit that the rule is established in this Court, that the Kirchoffs had no right to withhold defenses which they might have presented to the United States Court, for the purpose of making them the subject of an independent proceeding in another court. And since they had no right to reserve these defenses during the progress of the Federal foreclosure suit, they are now concluded by the Federal decree. Any proceeding in a State Court, which attempts to give them the benefit thereof, and which attempts to give to the Federal decree an effect which is different from the effect given to it under Federal law, is a review of the Federal decree.

II.

THE FACT THAT THE PROCEEDINGS IN THE STATE COURTS REVIEW THE FEDERAL FORECLOSURE IS SHOWN BY THE EFFECT OF THE DECREE OF THE STATE COURT UPON THE FEDERAL FORECLOSURE DECREE.

One of the most conspicuous features of the case at bar is the illegality and immorality which permeate the arrangement which is alleged in the bill.

The agreement which defendant in error sets up, was that the Insurance Company should proceed with its foreclosure in the United States Court, for the benefit of its debtors, the Kirchoffs, and hold the title, when acquired, in trust for them, to free the land from judgment liens of their creditors.

The manner in which the "intervening liens and incumbrances" were to have been disposed of, after they had ceased to be liens upon the property in question, is not definitely shown in the bill. In answer to the Receiver's petition for a writ of assistance, filed in the United States Circuit Court, Kirchoff, on his oath, speaking for the defendant in error, said, that the arrangement was, not that the land should be reconveyed to *Mrs. Kirchoff* after foreclosure, but that the conveyance should be made to himself, or to such person as he might name. (Rec., 107.) The present bill of complaint does not so state the agreement, and it may well be, so far as this bill is concerned, that it was the intention of the complainant to deprive her creditors of their security, merely in order that she might settle with them. The details of the proceedings are immaterial. The substantial fact is that the bill states an agreement for a fraudulent foreclosure.

The relation of mortgagor and mortgagee which subsisted between the Insurance Company and the Kirchoffs at the beginning of the foreclosure suit was to exist between them at its close, unaffected in any material particular. As between them the controversy was to be apparent, not real. The proceedings were to be limited in their effect, so as to operate against junior incumbrancers, and this limitation was to be imposed upon the Federal decree, by an agreement between the Kirchoffs and the Insurance Company, made, if made at all, long before the decree was entered.

If we assume the truth of the statements contained in the bill (Rec., 24), defendant in error was a party to a conspiracy, the purpose of which was to impose upon the United States Circuit Court and use its decree merely as a means of perpetrating a fraud.

Counsel for defendant in error have sought to establish that the agreement, upon which the bill is based, was a legal agreement, by the statement that at the time it was made, there were no judgments against Mrs. Kirchoff, which were liens on the property. This position is ineffectual for two reasons: In the first place, because the bill of complaint alleges "that upon examination of the title to said lots, it appeared that there were certain intervening liens and incumbrances upon the same, created after the execution of said trust deed" (Rec., 24); and in the second place, because counsel for defendant in error are compelled to admit, that, at least, one of these judgments had ripened into a title, the homestead property having been sold under an execution, and a sheriff's deed issued to the purchaser. (Rec., 112, 118.)

The question, therefore, in regard to the legality of the agreement stated in the bill, is this: Whether a con-

tract for a fictitious foreclosure, to be conducted in a Federal court for the sake of cutting out the interests of third persons, is a legal contract.

This question received considerable attention in the case of *Randall* v. *Howard*, to which reference has been made. In passing upon the character of such an agreement, this Court, speaking by Mr. Justice DAVIS, after quoting the allegations of the bill, which in that case were substantially the same as those at bar, said:

"These allegations, stripped of their indefiniteness and vagueness, mean simply this: That the parties to this bill, in order to counteract a claim set up by other parties for a portion of the mortgaged lands, combined together, through the aid of the court, to shorten the time of sale, and to cover up the real ownership of the property.

A fraudulent agreement was entered into, to defeat, as is charged, 'a fraud attempted against the complainants.' If the claim set up was a fraud on the rights of the complainants, does that consideration change the character of the agreement which was made to defeat that fraud? Manifestly not. The whole complaint of the bill is that the defendant will not execute the agreement thus fraudulently made, and the object of the bill is to compel him to do it.

A court of equity will not intervene to give relief to either party from the consequences of such an agreement. The maxim '*in pari delicto potior est conditio defendentis*' must prevail.

It is against the policy of the law to enable either party in controversies between themselves, to enforce an agreement in fraud of the law, or which was made to injure another. Story's Equity, Vol. 1. Sec. 298; *Balt* v. *Rogers* (2 Paige, 156); *Wilson* v. *Watts* (9 Gill, 356)."

In the case of *Dent* v. *Ferguson*, 132 U. S., 50, the same principle arose under a somewhat different state of facts. In the latter case this Court quoted with approval from its former opinion in the case of *Randall* v. *Howard*, *supra*, and reaffirmed the propositions there stated.

In *Connolly* v. *Cunningham*, 5 Pac. Rep., 473, there is a case very similar, in this respect, to the case at bar. That was a bill filed by a mortgagor against a mortgagee after foreclosure, praying for an account, redemption and specific performance of a contract to re-convey the mortgaged property. It appeared by the allegations of the bill that the mortgagor, Connolly, and the mortgagee, Cunningham, had united to conduct a foreclosure suit for the purpose of cutting off the lien of a third party upon the mortgaged land, and that after foreclosure was com plete, and Cunningham had obtained an absolute title to the land in question, he refused to recognize Connolly's interest.

The court held that such an agreement was fraudulent and not enforcible, using the following language:

"It is against public policy for persons to agree or undertake to occupy the time and attention of the people's courts with pretended litigation in which there is no real controversy or no change of attitude or relation sought to be effected by the judgment. * * * But it is said that there was a real controversy to be waged with Samuel Scott, the prior mortgagee, and a substantial judgment to be taken as to his rights. But on what theory was the plaintiff, Cunningham, entitled to have him made a party to the proceeding against Connolly? On the theory that Cunningham was waging against Connolly a *bona fide* suit for actual foreclosure, to which suit Samuel Scott was a necessary party. That theory was the theory on which the court must have proceeded to adjudicate against Scott's rights. But that theory was a sham and imposition on the court, and it is very questionable whether the decree against Scott has any validity whatever. In reality, plaintiff, Cunningham, and defendant Connolly were in collusion. They really were both plaintiffs, and the Scotts were the only defendants. * * * The deceitful and fraudulent character of this agreement appears in another way. It was stipulated that Cunningham should become purchaser at the

sheriff's sale, and although it is not said that no one else should bid, it appears from the whole tenor and spirit of the agreement that the parties intended that he and no other person should be purchaser. Otherwise their substantial relationship of mortgagor and mortgagee could not be maintained unimpaired. They made it their intent and interest that there should be no fair judicial sale, but only a sham sale—fraudulent as against Samuel Scott, idle as between themselves, sham as towards the court. This fraud, going to the very substance of their contract was sufficient of itself to make it void.

Any collusive act of parties, whereby the record in a suit is made up to deceive, purposely, the court, as to the true intent and object of the suit, is a fraud. * * * Every agreement to practice such deceit is fraudulent, against public policy, and void. This court, as a chancery court, is now asked to become a party to such an agreement by approving and confirming it, and assisting appellant to the advantage he expected to get from it. We refuse the alliance. We will leave the parties where we find them."

There is, perhaps, therefore, no doubt about the proposition, that the agreement which is stated in the Kirchoffs' bill of complaint, is not such an agreement as the United States Court would have enforced in the foreclosure suit. Mrs. Kirchoff's property was, by law, subject to the payment of her debts, and no court would relieve it of that burden. A legitimate foreclosure would divest her interest in the property, and would, as a necessary result, divest the interest of all persons who looked to her property for payment of her debts. There is no legal proceeding by which the rights of creditors can be divested and the rights of the debtor left intact.

If, then, the Federal Court would have refused to enter a decree which would operate against Mrs. Kirchoff's creditors, but not against Mrs. Kirchoff, can that effect be given to the decree by subsequent order of another

court? It must be remembered that the title derived through the foreclosure proceedings is still good against the parties holding the "intervening liens and incumbrances" mentioned in the bill of complaint. As to these persons, the decree is still susceptible of enforcement. Can it be that it is not capable of enforcement as against Mrs. Kirchoff? The only reason, that the parties holding such intervening liens are deprived of their interest in the land, is because the Kirchoff interest, through which they claim, has been divested. If, therefore, the foreclosure decree is not good as against Mrs. Kirchoff, it should not be good as against the holder of an intervening title to the Kirchoff interest, or any judgment creditor of Mrs. Kirchoff.

It follows then, that the Federal decree must stand as a whole or it must fall as a whole. The case cannot be subdivided so as to give to the Federal decree a partial operation such as that court, *if it had full control of its own decree*, would not permit.

If, in order to meet the alternatives of this dilemma, it be urged that the whole Federal decree should fall, our answer is, that the present proceeding does not seek to destroy the Federal decree as a whole. It seeks to take advantage of the Federal decree and to enforce it as against persons, interested in the "intervening liens and incumbrances," mentioned in the bill, while, at the same time, it seeks to get rid of the effect of the decree, so far as concerns Mrs. Kirchoff. The decree, which has been entered by the State Court, directs the Insurance Company to convey its title to the defendant in error, and in case of failure to make such conveyance, directs the master in chancery of the State Court to execute the conveyance on behalf of the Insurance Company. (Rec., 410.) If Mrs.

Kirchoff were to receive this deed, she would acquire a title, superior to the title acquired and held by any of her "intervening incumbrancers" prior to the foreclosure, and until the Federal decree of forec'osure had been set aside, she would have a right to use it as a muniment of her title. This, we submit, is impossible. The State Court has no jurisdiction which will permit it to modify the decree of a Federal court, nor can it enable parties to use that decree for purposes not sanctioned by the law of the court in which the decree was entered.

III.

THE FORECLOSURE DECREE OF THE UNITED STATES CIRCUIT COURT IS CONCLUSIVE OF THE MATTERS LITIGATED IN THE PRESENT SUIT.

It is not our intention to dispute the findings of the State Courts upon questions of fact. It has been decided that the Insurance Company did, in 1878, enter into the contract claimed in the bill (Rec., 305), and that the Federal foreclosure decree "was rendered, and the sale made by consent, for the purpose of clearing the different tracts of land, mentioned in the quitclaim deed from certain incumbrances." (*Insurance Co.* v. *Kirchoff*, 133 Ill., 368, 380; Rec., 311; 149 Ill., 536, 539; Rec., 516.)

Upon the strength of these findings, counsel for defendant in error argues that there is no question of law left in the case—that the questions at issue in the State Court, were whether, *as a matter of fact*, such an agreement as was alleged in the bill was made, and if so, whether or not, *as a matter of law*, the defendant in

error was entitled to a conveyance from the Insurance Company.

The finding that "the sale was made by consent, for the purpose of clearing the different tracts of land, mentioned in the quitclaim deed, from certain incumbrances," is a finding, either of a fraudulent agreement, or that the Kirchoffs consented to the entry of a hostile decree which would cut off all interest on their part, either legal or equitable, in the land in question—for the only legal decree, which could "clear the land" of junior incumbrances, would cut off the interest upon which these incumbrances rested.

From the statement of facts already made it has been shown that during the progress of the foreclosure suit in the United States Court, a dispute arose between the Insurance Company and the Kirchoffs, as to the effect of some negotiations which had taken place between them. The subject of the dispute was included in the subject of the foreclosure suit. *Under these circumstances there must have been some way in which the Insurance Company could have this dispute determined*, and for this purpose, in November, 1879, it offered back to the Kirchoffs the quitclaim deed which had been handed to Kendall and gave notice that it would not perform obligations which it insisted it had never assumed.

Upon this state of facts, a question of law is presented as to the effect of this action on the part of the Insurance Company. It is our contention that, thereafter at least, the foreclosure suit was hostile to the Kirchoffs' interest, and that if they had any defense to the foreclosure proceeding, arising out of their negotiations with the Insurance Company, it was their duty to have raised that defense and to have prevented the entry of an inconsistent decree.

In order to present to the Court this question of law, it will be necessary to consider the evidence sufficiently to show what the action of the Insurance Company was. The State Courts have made no findings upon the subject, and under these circumstances it is, we understand, in accordance with the practice of this Court to examine the record, to determine what questions of law are presented by the facts there stated. Thus, in *Dushane* v. *Beall*, 161 U. S., 513, the Court held that,

"*If all the facts stated in the record* before us, do not, *as matter of law*, warrant the conclusion at which the highest court of this state arrived upon this question, it is the duty of this court so to declare, and to render judgment accordingly."

To the same effect was the case of *Stanley* v. *Schwalby*, 162 U. S., 255, where the Court, in considering whether the purchaser of a title, took it with notice of an existing defect, said:

"*The evidence appears to us wholly insufficient in fact* and in law to support the conclusion that the attorney had any notice of a previous deed to McMillan or any knowledge of the circumstances tending to prove the existence of such a deed, that he should have considered and treated them as of any weight, or have reported them to the authorities at Washington.

The inevitable conclusion, *as matter of law*, is that the United States acquired a good and valid title as innocent purchasers, for a valuable consideration, and without notice of a previous conveyance to McMillan."

a. Assuming the existence of the contract claimed in the bill, nevertheless the evidence shows, that ten months before the decree in the Federal court, the Insurance Company notified the Kirchoffs that it refused to recognize the contract which they claimed. Thereafter, at least, the foreclosure suit was hostile to them.

We have already shown that it was an essential part of Mrs. Kirchoff's case, to allege and to prove, that the facts upon which she now relies, as the grounds for her relief, were not known to her in time to have been used in the progress of the foreclosure case in the United States Court.

This allegation is of the very substance of her case, for if the facts, which she now sets up, were known to her in time to have been used in the progress of the foreclosure suit, the defenses based upon them should have been made there, and are concluded by the decree in that case. There is no presumption in favor of the pleader which can take the place of such an allegation; on the contrary, the presumption is always against the pleader, and when the defense of a decree of court is set up, the presumption is in favor of the validity and binding force of every decree of a Superior Court having jurisdiction of the parties and of the subject-matter.

It seems, therefore, that it must be the legal conclusion from the pleadings, that the facts which are now brought forward, were known to complainant before decree in the Federal Court, and here we might very well rest our consideration of this feature of the case.

All of complainant's witnesses, however, in relating the story of the alleged agreement, have shown so clearly that the present bill contains nothing new that we desire to call the attention of the Court to this evidence.

The record places beyond dispute the fact that the company never authorized the so-called agreement, and promptly declined it upon the first information received. (Rec., 176, 222, 273; Exh., 39, 142, 144.) Had Kirchoff been led, at this time, to a point from which he

could not retire without injury? The only thing he claims to have done in pursuance of the so-called agreement, was to have executed the quitclaim deed of September 5, 1879. He does not claim to have had any defense to the notes and mortgage. If he had, the foreclosure proceedings were still pending, and his defense could have been interposed. His situation was entirely the same as it would have been had the so-called agreement never been talked of, except, possibly, for the execution of his quitclaim deed.

But this quitclaim deed had not yet been delivered. Kendall testified that he told Kirchoff he "would take his deed, would write to the company in regard to the conveyance back to him; in the meantime I would not put his deed on record nor take an advantage of him, intending to keep the matter open, so far as I can recollect now, until he had definitely settled the terms of his contract with the company, if he had any." (Rec., 158.)

Kirchoff nowhere attempts to deny this. It is the only possible conduct on the part of Kendall consistent with the whole current of events, as disclosed by the record.

Kendall's letter of November 1, 1879, was promptly met by the company's explicit refusal to accept the proposition which it contained. Kirchoff was immediately informed of this refusal, and given an opportunity to withdraw the deed. Kendall says:

"I know I had an interview with him (Kirchoff); I recollect now, after the receipt of that letter, and probably very soon after the receipt of it, in my office, at which interview the matter was talked over, *and he was fully advised of the decision of the company.*" (Rec., 152.)

"I think I sent for Kirchoff on receipt of that letter; I know I had an interview with him after the receipt of the letter, very soon after, and very likely on the same day. I think I tendered Kirchoff his deed back again or

at least I gave him an opportunity to withdraw the deed if he did not wish to deliver it; but he concluded to deliver the deed, insisting that he had a contract and would stand on his agreement with the company. I know I never recorded that deed without having an understanding in reference to it, and I do not think it was recorded by mistake." (Rec., 159.)

Neither is this denied by Kirchoff; on the contrary he expressly admits the substance of it when he says:

"I cannot remember whether they ever tendered the quitclaim deed, which we had executed to the company, back to me or not; there was some talk, but I said I would stick to my contract to give them a quitclaim deed and take the homestead. * * * I cannot remember whether he offered the deed back to me, but I remember there was some talk about it, and I said it was settled." (Rec., 297.)

Also:

"Mr. Kendall said that he had answer that they wanted more money. I answered him that I stuck to my contract that I had made." (Rec., 41.)

If, after this testimony, any doubt remains of Kendall's having communicated the decision of the company to Kirchoff, it certainly is silenced by a circumstance wholly inconsistent with any other view of the facts. It will be remembered that Mrs. Kirchoff's and Mrs. Diversey's deeds were executed on the same day, September 5, 1879. The Diversey deed was recorded seven days thereafter, September 12, 1879. (Rec., 130.) But the Kirchoff deed was withheld from the record. The motive naturally suggested for such action, and the only one given by any witness in the cause is stated by Kendall in substance as follows:

"When I received the deeds from Mrs. Kirchoff and Mrs. Diversey I recorded the Diversey deed and held the Kirchoff deed in my office until I should hear from the

company in regard to the conveyance to be made to Kirchoff." (Rec., 149.)

Also:

"I think I stated the matter somewhat in this way to Kirchoff at the time; that I would take his deed, would write to the company in regard to the conveyance back to him; in the mean time would not put his deed on record, nor take any advantage of him, intending to keep the matter open, so far as I can recollect now, until he had definitely settled the terms of his contract with the company, if he had any." (Rec., 158.)

No other reasonable motive for withholding the Kirchoff deed can be suggested. Now, is it reasonable to suppose that having withheld this deed from the record for two months, because he did not yet know if the company would approve of a sale to Kirchoff, Kendall would immediately put it on record, when the company disapproved of it, unless he had some understanding with Kirchoff that it was to be delivered notwithstanding such disapproval? What motive had Kendall to withhold the deed, pending the company's approval, that he did not have after the company's failure to approve? He apprehended that the company would not assent to Kirchoff's proposition, and, *therefore*, kept the deed so it could be returned. Are we to believe that as soon as he was certain that the proposition would not be accepted, he without any further understanding, put the deed beyond Kirchoff's control? His having communicated the company's decision to Kirchoff, before recording the deed, is the only assumption of fact consistent with either his or Kirchoff' recollection of the events, or with the unchallenged motive upon which his whole conduct with Kirchoff had been based.

Here, then, whatever may have been his thoughts on

the subject before, Kirchoff was explicitly advised that the so-called agreement had never been authorized by the company, and did not receive its consent now. A counter-proposition was offered him. He could either have accepted that, and thus have had an agreement to which the company *was* a party, or withdrawn his quitclaim deed, and thereby have been placed in precisely the situation he was before the deed was executed.

But Kirchoff had a good reason for not withdrawing the deed. The entire property mortgaged was not worth the entire mortgage debt. A year later, at the foreclosure sale, the two lots appraised in 1879 at $10,000 were bid off at $17,000, in order to bring up the bids to the amount of the debt. The quitclaim deed released both the defendant in error and himself from the danger of a deficiency decree. He could not afford, therefore, to withdraw the deed. Is it possible that, but for this other motive, he would not have done so? Can the Court doubt, but for this release from the entire indebtedness being also at stake, he would have withdrawn his deed? Especially so, if he were anxious to repurchase the homestead, as he now professes to have been?

The practical question Kirchoff then had to decide was, whether he would withdraw the deed and lose the benefit of the release, or leave the deed, and thereby drop the matter of repurchasing the homestead, except upon the terms of the counter-proposition submitted. He was not willing to do either. He chose to leave the deed, secure the release, *and take his chance of enforcing the so-called agreement, notwithstanding its rejection by the home office.*

It was that chance he took to the State Court for enforcement.

The defendant in error was certainly unfortunate in having involved her homestead in an indorsement upon her husband's debts. It is a misfortune, however, in which she has many fellow-sufferers. It came principally from that common financial calamity, under whose hand promised values shrank into hopeless depreciation. The wards, whose trustee this plaintiff in error is, were among those who had also to weather the storm.

Her misfortune is no reason why the law should be changed. When she came face to face with the Insurance Company she was given a choice to retrace any steps taken under a misconception of her relation to the transaction, or to go forward to a new and authentic understanding. She and the plaintiff in error thus stood upon an equal footing. Her choice to do neither, but to force the company into an agreement to which it never assented, is not, we submit, a clean claim to bring into a court of equity for enforcement.

In the argument filed by the defendant in error in the Supreme Court of Illinois, it was insisted that after the delivery of the quitclaim deed, the representatives of the company continued to assure Mrs. Kirchoff that the rejected proposition would be carried out. We do not see how this, if true, could attach any liability to the Insurance Company. Kirchoff then knew that the representatives of the company were without authority in that respect. It is nowhere hinted that after the letter of November 5th they received, or professed to receive, any further authority from the home office.

Kendall says (Rec., 114) that he did nothing after that time with reference to this agreement.

Warfield says that when Kirchoff came to him he was sent to Kendall for particulars.

Defendant in error had, immediately upon receiving the refusal of the home office, elected to deliver the deed and take her chances. She could not improve these chances by merely procuring new assurances from the discredited representatives. Neither would it have been good faith on her part to have relied upon any such assurances.

But it is plain, from the whole record, that no such promises were given her. In the light of the reports and correspondence, the making of such promises is simply incredible, except upon the theory that Warfield and Kendall were wantonly dishonest and disloyal. Have the kindness, though tedious, to read the letters of the company to Kendall and Warfield of November 5, 1879, rejecting the offer. (Rec., 273; Ex. 143, 144.) Follow that with the letters of November 8th and November 26th of Kendall and Warfield, respectively, to the company. (Rec., 223; Ex. 40, 41.) The correspondence then proceeded: December 3d DeWitt writes to Warfield to put Kirchoff out of the house if he does not pay his rent. (Rec., 274; Ex. 147.) December 6th Warfield changes the valuation on the homestead, without referring to the so-called agreement. (Rec., 224; Ex. 43.) February 5, 1880, Warfield is again instructed to turn Kirchoff out. (Rec., 277; Ex. 155.) February 7, 1880, Warfield replies:

"This matter has been placed in an attorney's hands for collection, but I hardly think he will succeed; we shall probably have to get an order from the court to put him out." (Rec., 234; Ex. 53.)

May 7, 1880, the home office again brings to Warfield's attention Kirchoff's unpaid rent. (Rec., 278; Ex. 169.) To this letter, May 28, 1880, Warfield replies that "about the time the president was here last, I gave the matter to

Wheeler, and he succeeded in getting $100 out of Kirchoff. Since then the Best Brewing Company have closed up Kirchoff's business, and he is out of funds, and likely to remain so. I have written Messrs. Kendall and Bliss to get an order from the court to either pay the rent or vacate the premises." (Rec., 241; Ex. 67.)

May 31, 1880, Kendall writes that he has "received a letter from Warfield, as receiver, saying he was unable to collect amount now due from premises occupied by Kirchoff, and requesting that measures be taken to eject him. Shall make application to court for assistance as soon as national convention is over, court having adjourned during the meantime." (Rec., 241; Ex. 68.)

June 7th, Warfield again writes:

"Referring to matter of rent due from Kirchoff for house on Rush street, have to say that he has to-day paid me $80, and promises to pay $60 per month, commencing on the 20th inst., until the account is squared. Have not much faith in his promise, and had it been earlier in the season would not have accepted the money; but under the circumstances thought it best to get the $80, and if the $60 is not forthcoming on the 20th, will immediately proceed to get possession." (Rec., 242; Ex. 69.)

July 12th, Warfield writes that he has instructed Kendall to get Kirchoff out, "and as soon as he does, I will rent the premises to somebody who will pay more promptly. (Rec., 243; Ex. 73.)

Can the court believe that during the period of these letters the representatives of the company were assuring Kirchoff that the so-called agreement would be carried out? It is plain that the company did not change its attitude toward the proposition after November, 1879. Did Warfield and Kendall reaffirm the so-called agreement, in the face of the then known wishes and instruction of the company?

Warfield says he told Kirchoff the foreclosure would go on and sent him to Kendall for particulars. (Rec., 70.)

Kendall says he did nothing after the receipt of the letter of November 5, 1879, in reference to the alleged agreement with the Kirchoffs except to notify Kirchoff of the company's decision. (Rec., 114.)

The assumption that they did is not supported by any tangible testimony. Kirchoff's reference to it is as follows:

"After we delivered the quitclaim deed they foreclosed; I asked Warfield what they meant, and he said I need not be afraid; it was better for us; and he told me to see Kendall. Kendall said he thought there were some judgments against the lots, and to make it safer they had to do it; it would be better for us, and we should have the deed after that. Mr. Kendall said it would not affect the contract, and would be better for the property." (Rec., 39, 40.)

"After we gave the deed, September 14, 1879, I found out they wanted to foreclose. Mr. Warfield told me it was all right, and that Kendall would explain." (Rec., 47.)

From this it will be seen that whatever assurances were given came from Kendall.

Warfield says:

"After the Kirchoff deed had been delivered and recorded, Mr. Kendall found that there were certain objections to the title of the property which could be removed by foreclosure. I notified Kirchoff that the proceedings would go on, in order to perfect the title, and referred him to Kendall for particulars. As I remember it now, I told Mr. Kirchoff we would have a deed from the Insurance Company executed, and the mortgage back, signed. It is my impression that Kendall prepared the deed and sent it to the company for execution. I did not think it would be necessary to wait until the title was perfected in the Insurance Company by a foreclosure before the deed was delivered." (Rec., 70, 71.)

As Kendall sent to the company for execution but *one* blank deed for conveyance, this conversation of Warfield

with Kirchoff must have occurred *before* the receipt of the company's letter rejecting the proposition, and is, therefore, pointless. But whatever the conversation was, or whenever it occurred, Warfield confirms Kirchoff that he was sent to Kendall for particulars.

It must not be forgotten, either, that this testimony of Warfield was given before he saw the correspondence between the company and himself, and when the whole transaction lay in his mind, in the confusion produced by the lapse of seven years.

Kendall's recollection upon this point appears in the record as follows:

Q. Were you ever instructed by the company or Mr. Warfield to eject him (Kirchoff) from the property?

A. I think I was requested by Mr. Warfield to get possession for him as Receiver of the property occupied by Kirchoff, because he had failed to pay rent, as stipulated in the lease; and I think I intended to have done so, but I do not think I ever got as far as to make any application to the court for assistance in the matter.

Q. Did Kirchoff ever inquire of you why you were proceeding with the foreclosure?

A. Yes, he did on one occasion.

Q. What did you tell him?

A. I told him that certain complications in the title that I had discovered since the delivery of his quitclaim deed, pertaining to the homestead lot, made it necessary in my opinion, to proceed with the foreclosure, get a decree and have it sold.

Q. Was any reference made to this agreement at that time?

A. Well, yes; *I think Kirchoff had something to say about his buying back that property*, with reference to the effect the foreclosure proceedings would have: I did not discuss that matter much with him; *I think I told him that it would not make any difference.* I recollect explaining to him that, in any event, it would be better for the title that it should be foreclosed in that way, to get

rid of this intervening encumbrance; and until that was done the company could not give a good title to it, nor take a good title back under a mortgage.

Q. You say you told him at the time, that the foreclosure would have no effect on the bargain that had been made?

A. I think I told him substantially that.

Q. And did you give him the idea at the time that the foreclosure proceedings would improve the title, and that it would be for his benefit as well as for the company's?

A. *I did, in the event that he became the purchaser.* (Rec., 159, 160.)

The key to the correct interpretation of this conversation is in the attitude, or relation, of Kendall and Kirchoff to each other at that time.

What was the attitude of Kirchoff and Kendall to each other at the time of this conversation? Kendall had previously informed Kirchoff that the so-called agreement was declined by the company, and that he could withdraw his deed. Kirchoff, with his eye upon the effect of the deed as a release, had declined to do so; but on the contrary, leaving the deed, announced his determination to stand by the so-called agreement, notwithstanding its rejection by the company. The lines to be pursued thereafter by each of them were clearly marked. Kendall would go on with the foreclosure, Kirchoff would insist upon the agreement. When, therefore, Kirchoff asked if the foreclosure would affect his agreement, the only answer Kendall could give would be in the negative. For, if the agreement had a good basis in law and in fact Kirchoff had a right to set it up in the foreclosure proceedings, and the decree would respect and enforce it. Kendall was careful, however, to tell him that the foreclosure proceedings would be a benefit to him only "in the event that he became the purchaser."

Was there anything in this conversation, reported vaguely and indefinitely to us by an adverse witness, which convinces the Court that Kendall, in the very teeth of the company's instructions, intended to bind the company *anew* to the so-called agreement? If so, he was guilty of nothing less than treason against his principal. Was there anything in the conversation calculated to mislead Kirchoff? He knew the company's previous attitude and his own position with reference thereto. He had no right to infer from Kendall's telling him the foreclosure would not affect his contract, that such contract was renewed. Knowing it had been repudiated once, he cannot thus carelessly become the beneficiary of the rule of estoppel, and force a contract that was never made.

b. It was the duty of the Kirchoffs, at once upon the repudiation by the Insurance Company of the contract claimed, to interpose their defense in the foreclosure proceeding, if they had any. Having failed to do so, they are precluded by the Federal decree from setting up claims which existed before that decree.

It is quite clear that in the course of the foreclosure in the United States Court a dispute arose between the Insurance Company and the Kirchoffs, as to whether any adjustment of the matter at issue between them had been made; the Kirchoffs on the one hand claiming the existence of a contract, and the Insurance Company on the other hand denying that any such contract had been made and refusing to perform obligations which it insisted it had not assumed.

Under these circumstances there must have been some course, open to the Insurance Company, by which this dis-

pute could be adjudicated. The matters involved in the dispute were the very matters involved in the Federal foreclosure suit, and concerned the title which was to be derived from the foreclosure sale; the terms upon which redemption was to be allowed and the parties against whom the decree was to operate. The Insurance Company claimed the right to sell the property at the foreclosure sale, free from any interest of the Kirchoffs, and claimed the right to limit redemption, by the mortgagors, to the statutory period. The Kirchoffs, on the other hand, claimed the right to compel the Insurance Company to purchase at the foreclosure sale, and when it had purchased, to hold the property in trust for them upon the terms of the agreement.

What course was open to the Insurance Company to settle this dispute, except the course which it actually followed in this case?

The Insurance Company did not procure the entry of a foreclosure decree by any misleading assurance; the Kirchoffs knew that it denied the existence of any agreement between them; they knew that if their contract was a lawful contract, it could have been embodied in the foreclosure decree. When, therefore, the Insurance Company applied for and procured the entry of a decree inconsistent with the agreement claimed, this very act was an adverse, hostile act, and was the fitting termination of a year of hostile foreclosure proceedings.

It is the agument of counsel for defendant in error that "the perfecting title by the foreclosure proceedings was part of the agreement," and it is argued that the agreement claimed would not have operated as a defense to the entry of a foreclosure decree, for the reason

that the agreement contemplated the entry of such a decree.

A sufficient answer to this is, that the agreement claimed did not contemplate the entry of such a decree as was actually entered. The agreement would not have been a defense in the foreclosure proceeding, in the sense that it would have prevented *any* decree of foreclosure from being entered, but if the agreement was a lawful one, it would have been a defense against the entry of any decree which would give to the Insurance Company rights, which were inconsistent with its rights under the agreement.

Of course, assuming that the agreement was actually made, it is very easy to see why it could not have been brought forward to the court or embodied in the decree. The benefit which Mrs. Kirchoff expected to derive from the foreclosure, as disclosed by the bill, was, that she would get her property out of the way of her creditors without injury to herself.

If, therefore, she could have found any court sufficiently complaisant to lend its records to such a purpose, its compliance would have been ineffectual, for a statement in the decree of an interest remaining in Mrs. Kirchoff, would have exposed this interest to the rights of her creditors, and have defeated the very purpose sought.

We have touched upon this subject elsewhere.. The fact to be noted here is that the Kirchoffs did keep silence about their supposed agreement for more than a year. They let a decree go against them which was inconsistent with the rights which they are now claiming; they waited until the period of redemption allowed by the decree had expired, and until the deed had been delivered to the In-

surance Company, and then they set up in another forum the claims that they could have presented, but did not present, to the United States Court.

There can be no doubt that a decree of a court of competent jurisdiction is binding upon all parties to the proceeding in which it was entered, as to all matters actually determined, and as to all other matters which might have been raised and determined in the case.

A person having a good defense is not permitted when sued, to keep silence, let a judgment go against him, and then raise his defense in some other proceeding or in some other forum.

It follows, therefore, that as soon as the Insurance Company repudiated Kirchoff's claim on the 5th of November, 1879, it was then complainant's duty to at once set up her rights in the foreclosure proceedings, if she had any, and failing to do so, she is estopped by the Federal decree from now setting up in the State Courts claims which existed before the entry of that decree.

That the Federal decree is, under such circumstances, conclusive and binding, is, we believe, established by the following cases:

Dowell v. *Applegate*, 152 U. S., 327.
Dimock v. *Revere Copper Co.*, 117 U. S., 559.
Nougué v. *Clapp*, 101 U. S., 551.
Case v. *Beauregard*, 101 U. S., 688.
Cromwell v. *County of Sac*, 94 U. S., 351.
Aurora v. *West*, 7 Wall., 82, 102.
Jones v. *Vert*, 121 Ind., 140.
May v. *Coleman*, 81 Ala., 325.
Speck v. *Pullman Co.*, 121 Ill., 33.

Adan v. *Mergenthein*, 113 Ind., 303.
Caldwell v. *White*, 77 Mo., 471, 473.
Shelbina Hotel Ass'n v. *Parker*, 58 Mo., 327.
Mally v. *Mally*, 52 Iowa, 654.
Bailey v. *Bailey*, 115 Ill., 551, 557.
Rogers v. *Higgins*, 57 Ill., 244, 247.
Harmon v. *Auditor*. 123 Ill., 122.
Stickney v. *Goudy*, 132 Ill., 313.

In *Mally* v. *Mally*, 52 Ia., 654, we find a case very similar to the one at bar.

In that case the plaintiffs brought an action for the possession of certain real estate, title to which they had obtained under the foreclosure of a mortgage. In defense of the proceedings the defendants, who had been the mortgagors, set up a written contract which they alleged had been made with the mortgagor prior to the foreclosure. This contract provided for a life lease on a portion of the land in question, to Christine Mally, one of the defendants and the wife of the other defendant, and in it other concessions appeared to have been made by the mortgagee for the benefit of the mortgagors. It appeared that these claims were not set up in the original foreclosure proceedings until after the judgment of the court was announced. Judgment of foreclosure was entered against the defendants, the property was bid in by the mortgagee and deeds regularly issued as in the case at bar. The action above referred to was then brought, by the parties holding sheriff's deeds, for possession. Judgment was rendered for the plaintiffs and the defendants appealed. The Supreme Court of Iowa, in its opinion in this case says:

"The defendant insists that the plaintiffs are not entitled to the immediate possession of the property because of the provisions of the written contracts set out in the answer and the amendment thereto. The plaintiffs in the foreclosure suit prayed for an unconditional foreclosure of the mortgage. *The decree rendered is an absolute one*, accompanied with the usual incidents, and to be followed by the usual consequences of an absolute foreclosure. It authorized a sale, to be followed, in the absence of redemption, by sheriff's deed, entitling the purchaser to immediate possession. Such a sale has been made, and such a deed has been executed. *If any facts existed at the time of the foreclosure, under which the plaintiff would not have been entitled to an absolute decree of foreclosure, these facts constituted pro tanto a defense to the plaintiff's action*, and should have been pleaded as such in the foreclosure proceeding. These written contracts constituted such partial defense, or they did not. If they constituted such partial defense, they should have been set up and relied upon in the foreclosure proceeding, and cannot be made available now. *Hackworth* v. *Zellers*, 30 Iowa, 433; *Dewey* v. *Peck*, 33 Iowa, 242; *Lawrence Savings Bank* v. *Stevens*, 46 Iowa, 429; *Collins* v. *Chantland*, 48 Iowa, 242.

If these contracts did not then evidence a condition of things which would have prevented an absolute foreclosure, they cannot now be set up, to deprive the plaintiffs of the benefits of the absolute foreclosure, which they have obtained.

The defendants did offer to set up the contract set out in the original petition as a defense in the foreclosure proceedings, but not until after the court had announced its judgment in the case. The court refused to allow the amendment as coming too late. It was clearly within the judicial discretion of the court to refuse to allow the amendment under the circumstances disclosed; *and if it were not, the decision of the court, not having been appealed from, is conclusive upon the defendants.* In any view of the case the written agreements do not now constitute a defense to the plaintiffs' action."

The opinion of this court in the case of *Dowell* v. *Ap-*

plegate, 152 U. S., fully sustains this proposition. That suit involved the title to a forty acre tract of land, which Dowell claimed under a decree of the Federal court, and a master's deed issued under that decree. The suit was brought in a state court of Oregon by Daniel W. Applegate for the purpose of obtaining a decree enjoining Dowell from asserting any title or claim by virtue of the latter's deed under the decree of the Federal court to the tract of forty acres which had previously been conveyed to plaintiff Applegate by William Applegate. The bill admitted that the tract of land in controversy was embraced in the deed made by the Master to Dowell, averring that a conveyance by William Applegate to Daniel W. Applegate was prior in time to the commencement of the suit in the Federal court, and that its validity was not put in issue or determined by the decree of that court. The defendant, Dowell, answered, basing his claims upon the decree of the Federal court and the sale under it at which he purchased. This court in its opinion, after holding that the decree of the Federal court, relied upon by Dowell, could not be treated by the state court as a nullity, said:

"Upon what principle can it be held that that decree being unmodified and unreversed, does not conclude the parties to the suit in which it was rendered, in respect to the liability of the lands described in it for the demands of Dowell as ascertained and settled by the court? It is said that the deed of October 8, 1874, under which Daniel W. Applegate claims forty acres, was not distinctly put in issue by the pleadings or determined by the decree. But its validity was involved in the larger question presented by the pleadings as to the right of Dowell to subject to his demands the interest of Jesse Applegate in all the lands referred to—those covered by donation claim number 38, and those not within that claim. The decree directing the

sale of all the interest of Jesse Applegate in the 121.55 acres on the 1st of January, 1869, was an adjudication, as between Dowell and the defendants in that suit who asserted title to those lands, that no claim asserted by either of them could stand against the right of Dowell to have those lands sold.

It is disclosed by the present suit that when Daniel W. Applegate answered Dowell's bill he held the deed of October 8, 1874. If Daniel W. Applegate became, when taking that deed, a *bona fide* purchaser of the forty acres of land now in dispute, and if the title so acquired was superior to Dowell's right to have that land sold for his demands against Jesse Applegate, it behooved him to assert that title in defense of the suit brought against him. The very nature of that suit required him to assert whatever interest he then had in the lands or any part of them that was superior to any claim of Dowell upon them, whether by judgment liens *or in any other form*. So far from pursuing that course—he forebore purposely, as may now be inferred—to claim anything in virtue of the deed of October 8, 1874, and long after the decree under which Dowell purchased he comes forward with a new, independent suit, based alone upon that deed, as giving him a superior title. His object is—certainly the effect of this suit, if it be sustained, will be—to retry the issues made in Dowell's suit, so far as they involved the latter's claim to have the forty-acre tract subjected to his demands. The decree of the Federal court was an adjudication, as between all the parties to the suit in that court, that Dowell was entitled, in satisfaction of his claims against Jesse Applegate, to subject to sale all the lands his bill sought to reach, which the decree directed to be sold. *And that decree, never having been modified by the court that rendered it, nor by this court upon appeal, necessarily concludes every matter that Daniel W. Applegate was entitled, under the pleadings, to bring forward in order to prevent the sale of the lands claimed by him, by whatever title.*

Having remained silent as to the deed of October 8, 1874, and having allowed the suit in the Federal court to proceed to final decree upon the question as to whether the lands described in the bill could be subjected to

Dowell's demands—which description included the forty acres here in dispute—and having been defeated upon that issue, and the decree having been fully executed, he cannot have the same issue retried in an independent suit based solely *upon a title that he was at liberty to set up, but chose not to assert, before the decree was rendered.*"

In the case of *Jones* v. *Vert*, 121 Ind., 140, the court says:

"It is undoubtedly true that a judgment in a foreclosure suit, or in a suit to quiet title, is conclusive of any claim or title adverse to the plaintiff in that case as against all who were made parties; and this is so whether the adverse interests or titles of the defendant are specially set up or not."

In *May* v. *Coleman*, 84 Ala., 325, it is held that:

"When a pending suit is compromised, unless it is brought to the attention of the court before the final decree, the parties will be concluded and estopped from setting up a compromise thereafter. A supplemetal answer is the proper mode to bring the compromise and settlement before the court, on which to try the issue thus presented."

IV.

THE DECISION OF THE UNITED STATES COURT UPON THE APPLICATION FOR A WRIT OF ASSISTANCE IS CONCLUSIVE OF THE PRESENT CASE.

In the course of the proceeding in the Federal Court a Receiver of the mortgaged property was appointed, and by him a lease of the property in controversy was made to the Kirchoffs. It is claimed in the present case that there was an agreement that all rent paid by the Kirchoffs to this Receiver should be applied as part of the redemption money provided for in the alleged agreement to redeem. The lease itself contained no such provision

as to the application of the rents, and the Kirchoffs after several payments of rent refused to pay more. Thereupon the Receiver filed his petition for a writ of assistance, and Mrs. Kirchoff, acting by her husband (Rec., 24), who was her agent throughout all these proceedings, filed her answer, setting up the agreement in question.

This answer makes no reference to the terms of an agreement touching the application of the rents. It did, however, set up the agreement for redemption, and asked that the writ of assistance be denied. No application was made at this time for any order modifying the decree of foreclosure or setting it aside. This relief, the answer alleges, Mrs. Kirchoff proposes to seek, her solicitors "having already in course of preparation a bill in chancery setting up the foregoing facts and asking that complainant be required to execute its undertakings in the premises, or, in default thereof, that the decree herein be set aside and held for naught." (Rec., 107.)

The matter presented to the Federal Court upon the hearing of this petition was precisely the question which was litigated in the State Courts of Illinois—whether the Insurance Company had made the agreement claimed, and what effect, if any, should be given to that agreement. In Kirchoff's answer to the Receiver's petition, which the present bill alleges to have been Mrs. Kirchoff's answer, he set up every claim made in the present suit. It is true that all the Receiver asked for was that possession of the property be delivered to him, but the question of possession involved the question as to the existence of the agreement under which the Kirchoffs claimed. Upon this answer, setting up the whole agreement, which is now relied upon in this case, the Federal Court decided against Mrs. Kirchoff, and the writ of assistance was issued.

The United States Court had jurisdiction to pass upon this question and it did pass upon it. It ordered that the Kirchoffs deliver possession, and they were ejected from the premises. This was done before any deed was issued to the company on the sale had under the decree in the Federal court, and it was also after the company had, by Kendall, its attorney, advised the Kirchoffs that the company would not sell back the homestead at the Rees valuation. The court ousted the defendant in error because she had no rights. The court would not have ejected her if it had found that she was there under a lawful contract of purchase, and that the Kirchoffs had executed their quit-claim deed in part performance. The court would not have ousted them if it had found that the agreement provided that the Kirchoffs should hold possession, and that the rent should be credited upon the redemption money. These facts being found, the court would have kept them in possession. The determination of these facts is the decision of questions necessary to the decision of the whole case. In other words, the State Court, when it heard the present bill, and when it decided the complainant's rights upon that bill, necessarily decided upon the same question which had already been passed upon by the Federal court. It is elementary that a decree is *res adjudicata* between the same parties and privies and in reference to all questions necessarily involved in that decision. This proceeding is between the same parties. The same question arose in that case that arises in this case. The property was still in the hands of the Receiver of the United States Circuit Court, and, under such circumstances, "nothing can be plainer than that any litigation for its

possession must take place in that court without regard to the citizenship of the parties."

Minn. Co. v. *St. Paul Co.*, 2 Wallace, 632.

Freeman v. *Howe*, 24 Howard, 450.

Randall v. *Howard*, 2 Black., 585.

The argument that this judgment was not conclusive in the present proceeding because "Neither of the parties to this case was a party to that proceeding," is without foundation. It is true that the answer to the Receiver's petition was signed by Julius Kirchoff, but it is also true that the bill of complaint in the present case alleges in terms:

"That thereupon *your oratrix*, through her said husband, resisted said application for said writ of assistance, and set up, as defense to the application of said receiver, an answer setting forth in substance the aforesaid agreement between *said company* and your oratrix, but *said company*, through its solicitors employed in said suit, supported the application of said receiver, and wholly disregarded its agreement with your oratrix, and procured the order of said court for the assistance of said writ, whereby your oratrix and her husband were compelled to vacate their homestead."

V.

THE FEDERAL QUESTION IS CONTROLLING. NO OTHER QUESTION IS INVOLVED WHICH IS DECISIVE OF THE CASE.

During the progress of this litigation, counsel for the defendant in error have argued alternately, that their bill is a bill to redeem, or that it might be sustained as a bill for specific performance of a contract. The two theories

are inconsistent with each other. When counsel proceeded on the theory that they were seeking the relief of redemption from a mortgage, they were confronted with the Federal decree. When they attempted to establish a case for specific performance of a contract, they were met not only by the Federal decree and the question of *res adjudicata*, but also by the Statute of Frauds. Having avoided the last named difficulty, on the ground that the bill was a bill for redemption, we shall not be surprised, since this obstacle is out of the case, to see them fall back to the position that the case is one for the specific performance of a contract; that the State Courts had exclusive jurisdiction to enforce such a contract; and that therefore this Court has no jurisdiction to review the question.

To such a proposition the record, when taken as a whole, is a complete answer. For it shows,

First. That the pleadings make out no such case.

Second. That the evidence makes out no such case.

Third. That the relief granted by the decree complained of was redemption and not specific performance.

When the bill was filed in 1882, a claim was made of the right to the specific performance of the contract. In 1887 the bill was amended and made to include the prayer for redemption. The prayer in the amended bill was based substantially on the same allegations as in the bill originally filed.

The agreement claimed was an agreement by which complainant was to be allowed to redeem from the trust deed; and while this prayer for relief asked alternately for redemption in accordance with the terms of the agree-

ment, and that the defendant might be compelled to perform the said agreement, the specific performance which was asked was the specific performance of an agreement to redeem. No other agreement was mentioned or referred to in the bill.

Among other defenses to this bill the defendant set up the Statute of Frauds, and the defense was sustained. In the trial court Judge TULEY, in his opinion dismissing the bill, said:

"I am satisfied that, under the authorities, I can give no relief in this case, either as a bill for specific performance, or as a bill to redeem, or other relief whatever."

From the decree dismissing the bill, complainant appealed directly to the Supreme Court of Illinois, and on this appeal, Mr. Justice SCHOLFIELD, speaking for the court, said:

"If the complainant were to have a decree to all she shows herself entitled, it could only be that she be allowed to redeem pursuant to the terms of the agreement."

128 Ill., 199 (203).

The first appeal was dismissed by the Supreme Court on the ground that a freehold was not involved, and was next considered by the Appellate Court on a writ of error. In deciding the case the court said:

"The complainant filed her bill to redeem in June, 1882. The lots she was to redeem and the principal sum she was to pay, as well as the rate of interest, are definitely fixed by the agreement. The time at which the interest was to begin and the amount and time of payment of the installments are left uncertain. *But this is not a bill for specific performance.*" (Rec., 317, 318, 400).

33 Ill. App., 613.

The Supreme Court, on the appeal from the judgment of the Appellate Court, begins its opinion with this significant statement:

"This was a bill in equity brought by Elizabeth Kirshoff * * * against the Union Mutual Life Insurance Company to redeem (certain property) to which the company acquired title under a quitclaim deed from the complainant and her husband, and under certain foreclosure proceedings in which she, her husband and others were defendants." (Rec.. 305.)

After discussing the evidence and holding that the agreement claimed was one under which the complainant was entitled to redeem, the court said:

"We have said nothing in reference to the argument that this is a bill for specific performance and hence falling within the Statute of Frauds, *as we have not regarded it as a bill of that character.*" (Rec., 305, 311.)

133 Ill., 371, 380.

It will be seen, therefore, that the Supreme Court of Illinois did not rest its judgment upon the proposition that the proper relief in the case was the specific performance of a contract; that court expressly said that it did not consider the case as one of that character. On the other hand, the court states in substance that it *does* rest its judgment on the ground that the bill and the evidence makes out a case of redemption, and proceeds to explain the manner in which such redemption should be allowed.

But aside from this, it must be admitted that the bill is either a bill for specific performance or a bill for redemption. It cannot be both.

Complainant has taken the benefit of the decisions of the State Court and has avoided the defense of the Statute of Frauds by insisting that the present bill is not a bill for specific performance of a contract.

Can she be permitted in this Court to abandon this position, now that the Statute of Frauds is out of the case, and attempt to sustain the jurisdiction of the State Courts and exclude this Court from taking jurisdiction of this writ of error, upon the ground that her bill is a bill for specific performance?

It necessarily follows that the ground covered by the present case was completely covered by the previous decree of the Federal Court. Every claim presented to the State Court in this suit had either already been presented before the Federal Court in the foreclosure suit, or should have been so presented. The larger issue of whether the Insurance Company in that suit had the right to the absolute foreclosure of its mortgage, as against all the rights of the defendants to the suit, in that property, included every issue that could be made in the present case, and when the State Court undertook to grant relief to the complainant in this suit, that court failed to give to the Federal decree the effect to which it is entitled. And we again submit that this is the controlling question in the present case.

In conclusion there are two or three matters which we would like to suggest to the Court without extended argument.

We have already referred to the essential immorality which pervades the plaintiff's claim. We desire now to call the attention of the Court, briefly, to the character of the testimony advanced in support of the claim.

All the witnesses for the complainant have a lively interest in the subject-matter of the suit. Kirchoff, if not actually the party in interest, was at least the husband of

the complainant and her agent, largely to be benefited by a successful result. Warfield and Kendall were both discharged employes of the Insurance Company, and so far at least as Warfield was concerned, relations with the company were far from friendly (Rec., 72, 73), while on the other hand, Julius Kirchoff was at the time the testimony was taken in this suit, in close business relations with him. (Rec., 73.)

So far as concerns the former employes, it is perfectly clear upon the record, that if their testimony in this case is true, their letters and reports to the Insurance Company were not true, and it is equally clear that if their letters and reports were true, their testimony in this case, so far as it supports the alleged agreement is utterly false.

Both Kendall and Warfield deny that they personally made the contract which the Kirchoffs claim.

Kendall testifies:

"Mr. Kirchoff made some arrangements through Mr. Warfield, *I think*, the financial agent of the company, to redeem his homestead. * * * *These negotiations were not conducted by me.* I was only advised of them as they were going on, by Mr. Warfield, and by conversations with Kirchoff." (Rec., 109, 110.)

Warfield testifies:

"Personally, as agent of the company, *I did not make the agreement heretofore testified to;* what I did was to submit to the Kirchoffs propositions, as propositions coming from the company. Whatever I did in the matter was communicated to the company or its officers." (Rec., 91, 92.)

It should also be borne in mind that Mr. DeWitt, the president of the Insurance Company, during the period of all these alleged transactions, by his testimony in this

case, emphatically denies that he had any conversation with Warfield or Kendall in relation to this alleged agreement or that any such proposition was communicated to the company until he received the letter from Kendall of November 1, 1879, in which the draft of the proposed deed to the Kirchoffs, for the homestead lot, had been sent by Kendall to the company. He also denies that any such proposition was authorized by the company. (Rec., 174-178.)

When we come to Kirchoff's testimony we find some confusion. He says (Rec., 41) that he made the contract with Mr. Warfield and Mr. Kendall. This he repeats (Rec., 44), saying that he personally made the contract upon which complainant relies with Mr. Kendall and Mr. Warfield. Afterwards Kirchoff grows less certain (Rec., 49), saying that the contract was made with Mr. Warfield. He does not remember whether Kendall was even present, and subsequently Kirchoff settles down to the proposition (Rec., 51) that he made this contract with Mr. Warfield alone.

Kirchoff is equally uncertain as to *when* he made the contract. Sometimes he says that he made it in 1878 before the first foreclosure bill was filed. (Rec., 59) He also says (Rec., 44) that the contract was made in 1879.

There is some uncertainty between the witnesses as to whether the contract embraced redemption of one lot or of two lots. Kirchoff says throughout his testimony that it was the homestead that was to be redeemed. The homestead lot was a corner lot, fronting on Rush street. There was a smaller lot, not contiguous to the homestead lot, but barely touching it on one corner, fronting on Pine street, and the decree of the State Court has allowed redemption both of the homestead lot and of the Pine street

lot. The Rush street lot was the only lot occupied as a homestead. (Rec., 68.) It is Warfield's testimony that the agreement embraced the homestead and the lot cornering on the homestead. (Rec., 69.) Kendall, on the other hand, understood that the agreement covered only the Rush street lot, for Kendall drew up the deed which Kirchoff requested from the company, and sent that deed to the company for execution. The only property described in that deed was the one lot on Rush street. (Rec., 291.)

Kirchoff, in his testimony, says that the alleged agreement was made by him as agent for his wife. In his answer to the petition for a writ of assistance, however, he swears that the agreement was made for himself, and that it provided that the company would make to him, or to whomsoever he might nominate, a deed for the two lots.

Comment on such testimony as this is superfluous. We refer to it now merely because it emphasizes our proposition that the value of the Federal decree cannot be made to depend upon the weight which State Courts may or may not give to the evidence of discredited agents and interested witnesses testifying to the same matters passed upon by the decree.

The great gift of civilized government is the means for the peaceful determination of private disagreements. When a judgment or decree is once rendered by a court of competent jurisdiction, that judgment is binding upon the parties for all time to come. It stands by its own strength, and is not subject to impeachment in any other manner than along those narrow lines which public policy and the practice of the courts have established. The suitor, who

has secured a favorable judgment, is protected by it against any infirmities of memory which his witness may afterwards suffer, and against the obliquities of human nature, to which witnesses are more or less liable. A judgment resting upon memory or honesty, would have for its foundation the weeds that ride the sea. It might appear permanent enough to-day, but to-morrow would be drifted from the vision. Doubtless unjust judgments have been entered, both in State and Federal Courts, but to permit any court to disregard the judgment of another because it attached different weight to the evidence upon the question submitted, would be to make litigation endless; to deprive the Federal Courts of the paramount authority which they now exercise upon subjects of Federal law, and in our effort to escape the ills we know, to fly to others, and greater, that we know not of.

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